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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DA-CHUAN ZHENG, and
KUANG-SHIN LIN
Petitioners,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the use of the terms "countermeasures" and "counter-countermeasures" on the U.S. Munitions List (22 C.F.R., section 121.01 Category XI(a)) satisfy the statutory requirement of the Arms Export Control Act (22 U.S.C., section 2778) that the President designate "items" for criminal liability purposes?

2. Does the U.S. Munitions List designation "countermeasures" and "counter-countermeasures" constitute an unconstitutional exercise by the President of a delegated power or an invalid sub-delegation to the executive administration so as to violate the defendants' due process rights in the indictment at bar?

3. Would men of common intelligence understand the meaning of an indictment charging a conspiracy to arrange for the purchase of defense articles where the designation is identified as "active and passive countermeasures and counter-countermeasures," thus being impermissively overbroad and vague?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

NO.

DA-CHUNG ZHENG and KUANG-SHIN LIN

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners Da-Chuan Zheng and Kuang-Shin Lin* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals

*Pursuant to Supreme Court Rule 21.1(b) the other co-defendants below were David

for the Third Circuit which reversed the District Court's dismissal of the indictment.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED.

The petitioners Da-Chuan Zheng and Kuang-Shin Lin seek a writ of certiorari to review the Circuit Court's judgment (A 15a)* rendered in accordance with an opinion of the Third Circuit (A 1a) on July 19, 1985; the petition for rehearing was denied on August 27, 1985. The judgment reversed the District Court's dismissal of an indictment charging conspiracy by the defendants to violate the Arms Export Control Act (AECA), 22 U.S.C., Section 2778 (1982) by arranging for the unlawful purchase and export of "defense articles" included

*A refers to the Appendix to this Petition annexed.

on the U.S. Munitions List, 22 C.F.R., Section 121.01 Category XI(a) (1984).

The Supreme Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C., Section 1254(1). See, The Conqueror, 166 U.S. 110, 113-114 (1896); U.S. v. General Motors Corp., 323 U.S. 373,377 (1944); Nixon v. Fitzgerald, 457 U.S. 731,743 (1982).

PERTINENT STATUTES, REGULATIONS AND CONSTITUTIONAL PROVISIONS

The following statutes and regulations set forth in the appendix are pertinent:

22 U.S.C., Section 2778; 22 U.S.C., Section 2794(7); 50 U.S.C.

App. Section 2416(b); 50 U.S.C. App. Section 2404(d); 50 U.S.C. App. Section 2405(k); 22 C.F.R. Section 121.01, category XI; 22 C.F.R. Section 127.

The following constitutional provisions set forth in the appendix are pertinent:

The Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Introduction

Petitioners seek review of a Circuit Court's reversal of a district court dismissal of the indictment below. The AECA authorized the President to designate the "items" which will constitute the Munitions

List. The District Court held that a designation "countermeasures and counter countermeasures" is not a designation of an item but of a "category" and therefore impermissible. The Third Circuit reversal sanctions the exercise of executive power in creating item designations on the U.S. Munitions Control List, which has the effect of insulating the List from congressional control and review. The initiation of criminal prosecutions, as at bar, based on the designation which is a most arbitrary and all encompassing trade proscription, is antithetical to constitutional safeguards in criminal proceedings. The potential for abuse is accomplished by generic indictments involving vague categories of goods on the Executive's list, inconsistent with the

congressional mandate of the AECA (22 U.S.C. Section 2778) that the List (C.F.R. Section 121.01 et seq.) be comprised of items as opposed to categories.

B. Concise Statement of Facts

Defendants were indicted on February 23, 1984, in a single-count conspiracy to violate Section 38 of AECA, 22 U.S.C., Section 2778, for allegedly arranging for the unlicensed export of "defense articles" purportedly on the U.S. Munitions List. 22 C.F.R., Section 121.01 et seq. (A170a, 178a-179a). The indictment did not directly allege what "defense articles" were involved, but there was a reference in a non-charging portion of the indictment to certain "travelling wave tube amplifiers" and

"travelling wave tube amplifier chains" (collectively "TWTAs") (A 147a para. 5).

TWTAs do not appear on the List. The government contends that TWTAs are encompassed by a List reference to "active and passive countermeasures and counter countermeasures" (hereinafter "countermeasures"). However, there is no reference to countermeasures in the indictment (A 144a), nor in the underlying complaint (A 137a). The complaint rather suggests that the TWTAs were "radar-jamming" equipment, although there is no reference to "radar-jamming equipment" either on the List or in the indictment. The only item proffered by the government to support its contention that the TWTAs involved were radar-jamming equipment

is an affidavit of a government munitions expert (A 150a), which does not state that the TWTAs involved here are used for radar-jamming, and goes on to state that most TWTAs have commercial purposes and "are not designed to function, and cannot effectively be utilized, as military countermeasures." Defendants did not concede that the TWTAs here could be used for radar-jamming purposes.

Defendants moved below for the dismissal of the indictment, raising claims of insufficiency of the indictment, vagueness of the List "countermeasures" reference, and improper delegation and subdelegation of legislative authority to the Executive, along with other grounds (See Opinion I, A162a). The trial

court reserved on the vagueness challenge pending trial (A71a), and denied defendants' other motions (A109a). Defendants then filed a separate motion to dismiss on the grounds that the List "countermeasures" designation was invalid under the enabling statute, 22 U.S.C., Section 2778, which requires that the List be composed of "items." The trial court granted this motion, and dismissed the indictment (A19a), holding that the designation "countermeasures" was too broad to constitute an "item" within the meaning and Congressional intent of Section 2778.

The Government appealed the District Court's determination that the "countermeasures" designation identified by the Government to be the

applicable "item" on the List encompassed TWTAs. In reviewing the dismissal of the indictment the Court held that the term "items" and "articles" were used interchangeably and that Congress' " ... minor word substitution did not signal a substantial but unarticulated shift in Congressional policy ..." so as to require a more specific designation of items on the List.

The Circuit Court further held "... that 'items' (does not) demand more precision than that discerned by the President" (A12a). By permitting countermeasures to be "items", it intended to extend "the full meaning" (A13a) of the statute even in the criminal context. The Court found "we are not satisfied that

in the military electronics field 'countermeasures' does not mean radar-jamming devices and hence is as much an item as a nuclear propulsion plant" (A 14a). It further relied upon the A.E.C.A. savings clause as a basis for the predecessor Munitions List being intended by Congress to continue in effect despite the new act.

REASONS WHY THE WRIT SHOULD BE GRANTED.

(1) Where a national policy statute such as the AECA is construed so as to permit an unbridled scope of administrative control in the Executive branch of government in the designation of export items, there is a real potential for abuse, both in the criminal enforcement and in the administrative functioning of the

legislative policy.

(2) The AECA specifically requires that the President designate items on the U.S. Munitions List. In the indictment at bar, defendants were charged with conspiracy to violate a Section which has been designated "active and passive countermeasures and counter countermeasures." The indictment refers to TWTAs which are not on the list. Since the President has not designated an "item" encompassed by the List. The indictment must be dismissed.

(3) Congress in enacting the AECA in 1976 intended to require particularization of the List of controlled military exports. It changed the word "article" to the word

"item" and, by adding periodic review of "items", as well as requiring congressional reports of the military exports, intended to more closely monitor military items. The Third Circuit Court's opinion dilutes the legislative control and correspondingly enhances the executive power beyond the legislative intent. There can be no indictable crime for the conspiracy charged.

(4) The Executive, in delegating or subdelegating the composition of the List without standards to guide the exercise of discretionary power, resulted in this particular case in a failure of itemization which requires this Court's intervention to prevent sanctioning of arbitrary exercise of a delegated power.

(5) Due process requires that men of common intelligence be able to understand a charge against them (Lanzetta v. New Jersey, 306 U.S. 451,453 (1939)). The assertion of criminal liability based upon a charge of conspiring to export an "item" designated as "countermeasures" does not comport with that requirement.

ARGUMENT

POINT I

THE "COUNTERMEASURES" DESIGNATION OF THE U.S. MUNITIONS LIST DOES NOT FORM THE BASIS FOR CRIMINAL LIABILITY BECAUSE "COUNTERMEASURES" IS NOT AN "ITEM" AND THE PRESIDENT IS REQUIRED TO LIST ITEMS CONSISTENT WITH AECA, 22 U.S.C., SECTION 2778

A. The Court of Appeals Decision Is Contrary To The Plain Meaning of the AECA and to Its Context And Underlying Purposes.

1. Plain Meaning

The Court of Appeals was quite direct in its rejection of the plain meaning of the word "items", disregarding the "common sense" approach advocated by the District Court (A26a-28a). The court dismissed the statutory language as a "minor word substitution" intended as a mere sylistic convenience, and at the same time applied a "relativistic" analysis which rendered the word essentially meaningless.

The Circuit Court did not comply with this Court's mandate that congressional language must be the starting point, Reiter v. Sonotone Corporation, 442 U.S. 330,337 (1979) and apply the plain meaning expressed in the legislation, Continental

Products Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102,108 (1980).

The District Court properly concluded that the President was authorized to designate "items" on the List and, using "common sense" (A 28a) and with reference to dictionary definitions, held that "'(c)ounter-measures' is simply too broad a description to be considered an 'item'" (A 28a). See, Caminetti v. United States, 242 U.S. 470, 485-486 (1917) (presumption that "statutory words are ... to be used in their ordinary and usual sense, and with the meaning commonly attributed to them.") Lexicographic sources such as dictionaries are a permissible, if not preferred, source. See e.g., Lanzetta

v. New Jersey, 306 U.S. 451, 454-456 (1939), where the Court reversed a guilty verdict under a New Jersey law making association with a "gang" a criminal offense. Even if the word "countermeasures" is considered a "term of art", (A14a) it is far too broad a category to be an item. Thus, countermeasures is defined in Dept. of Defense Dictionary of Military and Associated Terms (with the NATO, CENTO and TADB Glossaries, Inc) (The Joint Chiefs of Staff, Washington, D.C. (June 1, 1979)) as "That form of military science which by the employment of devices and/or techniques has as its objective the impairment of the operational effectiveness of enemy activity. See also electronic warfare". The same resource in defining electronic warfare has a

sub-division "electronic countermeasures" which is further subdivided into areas of "electronic jamming" and "electronic deception". The Circuit Court, by permitting the "countermeasures" designation as the basis of a criminal prosecution vitiated the meaning of the statutory declaration of AECA.

The admonition in Adamo Wrecking Co. v. United States, 434 U.S. 275,283 (1978) is particularly pertinent. In Adamo, the Court upheld the dismissal of an indictment grounded on a purported violation of a regulation designating as an "emission standard" that which really was not such a standard at all. The Court stated in a sentence in which the word "item" could easily be substituted here

for "emission standard":

> " ... Congress intended, within broad limits that 'emission standards' be regulations of a certain type, and ... did not empower the administrator, after the manner of Humpty Dumpty in Through the Looking Glass, to make a regulation an 'emission standard' by his mere designation."

2. Legislative Context and Intent

The Court of Appeals concluded that there was not "even a clue from Congress on how much precision was to be used in preparing the Munitions List ..." (A 12a). There is no doubt but that the central purpose behind the enactment of AECA in 1976 was to "restructure U.S. arms sales policies to provide for increased Congressional supervision and review of all aspects of the foreign military sales program." House Report (International Relations

Committee) No. 94-1144, May 14, 1976 (94th Congress, 2d Session), quoted in 1976 U.S. Code Cong. and Admin. News 1378, 1385. The Act reflects Congress' "strong desire to provide for increased congressional participation in the formulation of U.S. military assistance and sales policies and programs." Id. at 1387.

One way Congress sought to insure its role was to require the President to report in detail on the scope of his export controls 22 U.S.C., Section 2776. Specific List itemization does not merely "facilitate" this reporting as the Court of Appeals observed: the reporting requirements of the AECA depend on accurate and specific itemization. Section 2776(a)(4), for example, requires information for all

export licenses with respect to each "item" of commercially sold military equipment. Therefore, it is evident that the reporting requirements presuppose a particularized List, thus effectuating congressional oversight.

In 1982, Congress amended AECA, 22 U.S.C., Section 2778(f) to further insure a tightly controlled List. That section requires that the President "periodically review the items" on the List to see "what items, if any" should be removed, and report such review to Congress. The legislative history to this section indicates that the congressional conferees "expect(ed) that the List should be reviewed at least annually." 1982 U.S. Code Cong. & Admin. News (Vol. 3), p. 2496.

The meaning of the itemization

terminology used in the 1976 AECA is clarified by reference to 22 U.S.C. section 2794(7) which defines "defense articles and defense services," with respect to commercial exports, as "those items designated by the President" pursuant to 22 U.S.C. section 2778(a)(1). The House Report explains that

> "For purposes of commercial export control under this act, it is the nature of the item which determines whether it is included in the term 'defense articles and defense services' and not its intended use as is the case for purposes of government to government sales."

House Report (International Relations Committee) No. 94-1144 May 14, 1976 (94th Congress 2d Session) quoted in, 1976 U.S. Code Cong. and Admin. News 1378, 1415. This comment clearly shows Congress' concern for specificity when

it comes to commercial export controls. "Countermeasures" as a target of commercial export controls, plainly does not coincide with this legislative mandate. See also, the Export Administration Act ("EEA"), 50 U.S.C. App Section 2401 et seq..

The EAA as a corollary export control statute should be relied upon for construction purposes. First, both statutes restrict the unlicensed movement of goods from this country abroad. Second, the EAA explicitly provides for coordination between the EAA and AECA (50 U.S.C. App Section 2416(b)). Third, the AECA was amended so that the President's enforcement powers under that act are specifically derived from his power under the EAA, and are "subject to the same terms and

conditions as are applicable to his EAA powers." (In fact, the AECA post-dates the EAA of 1969, and Section 2778(e) was added to insure that exercise of powers under the AECA would be in conformity with the EAA). The EAA contains a corresponding provision, 50 U.S.C. App Section 2416(b).

The EAA encompasses the list of "Military Critical Technologies", (MCTL) which is a part of the Commodity Control List (CCL), Section 2404(d)(5). Thus, Section 2404(d)(3) requires that this MCTL "be sufficiently specific to guide the determination of any official exercising export licensing responsibilities ...". Similarly, 50 U.S.C. App Section 2405(k) requires that "goods or technology" subject to foreign policy controls be "clearly

identified" when placed on the CCL.

Indeed, both the CCL proper and its constituent MCTL contain significantly more specific listings, including the type of materials apparently involved in the case. See, CCL, 15 C.F.R. Section 4516B:

> (Communications, countermeasures equipment ... including but not limited to special purpose broadband monitoring receivers with detection capabilities; optical and video detectors; microphone detectors; nonlinear junction detectors; telephone analyzers; and parts and accessories, n.e.s. ...

See, Part A, Section 9.5 of the MCTL DoD Ad-A146 998, October 1984, pp. 9-10 to 9-11:

> Communications Countermeasures Technology as follows: [contains twelve separate descriptive titles including e.g., compressive receivers using dispersive filters and convolvers with

> sidelobes better than 20d transmitter exciters employing synthesizers and modulation techniques, and automatic antennae tuners cabable of tuning rates exceeding 30MHz/sec) .

Also, if an "item" is removed from the List, considerations must be given to whether controls should be imposed under the EAA. 22, U.S.C. Section 2778(f). The District Court recognized this "language coordination," (A. 35a), and was justified in looking to the legislative history of the EAA to give meaning to the "items" requirement in terms of federal export policy under the Arms Act.

What emerges from this legislative context is the clear notion that Congress wanted to focus the export control mechanism, thereby providing enhanced notice to exporters of

precisely what items require licensing. In the words of the District Court, the elmination of uncertainty regarding U.S. export policy was additionally intended to "remove unnecessary barriers to exporting goods which might arise from the chilling effect that necessarily attends less clear regulation." (A. 131a). In fact, Section 2778 of the AECA itself, in a new clause introduced in 1976 simultaneously with enactment of the express itemization requirement, exhorts the President, in designating items on the List,

> "to provide foreign policy guidance to persons of the United States involved in the export and import of defense articles and services."

The itemization requirement is

clearly one of the tools Congress used to improve notice to potential arms exporters and thereby facilitate trade. Itemization further promotes a more focused federal export control policy by forcing regulators who compile the list to examine just exactly where controls are necessary. Indeed, the coordination of federal export policy is reflected in 22 U.S.C. Section 2778(f) of the AECA which also minimizes uncertainties by requiring the President to periodically review the Munitions List and remove "items" no longer warranting export controls.

B. The "Countermeasures" Designation Does Not Have Implicit Congressional Approval and Does Not Constitute An Agency Interpretation Entitled To Any Deference.

1. Lack of Congressional Approval

The government has relied heavily

on the fact that the List and its "countermeasures" entry preexisted the 1976 passage of the AECA with its "items" requirement, and that the repeal of the prior law accompanying such passage included a "savings clause" (AECA Section 212(b), see annotation to 22 U.S.C.A. Section 1934). The Circuit Court said that "Congress was well acquainted with the format of the List and the terminology it employed" (A. 10a), but at another that Congress "has never even addressed the contents of the List" (A. 11a).

Congress never explicitly or implicitly approved of generic category listings such as "countermeasures", nor even examined the List closely at all. The significance and effect of the savings clause was not to permit a

lapse in the law before the Executive could act. Congress did not reenact the List as it was contructed. See, e.g., Knickerbocker, Ice Co. v. Stewart, 253 U.S. 149,162(1920). If Congress had meant to approve or adopt the existing Munitions List when it passed AECA, it could have expressly done so. It did not.

This Court has often held that extreme caution must be exercised before a court would imply, as did the court below, congressional approval of an administrative practice or statutory interpretation based on even a reenactment of the underlying statutes, Commissioner v. Glenshaw Glass Co., 348 U.S. 426,431 (1955). Thus, the Court in SEC v. Sloan, 436 U.S. 103 (1978), in striking down an

unauthorized SEC summary suspension procedure based on a statutory interpretation, rejected the agency's argument that Congress was aware of the SEC interpretation when it reenacted the pertinent statute. Even though it was clear that the SEC interpretation and practice had been brought to the attention of, and has been "accept(ed)" by a Congressional committee at the time of reenactment (at 120), the Court held that this was "scarcely the sort of congressional approval" required for inferring congressional validation of an otherwise statutorily proscribed administrative practice. Accord, Aaron v. SEC, 446 U.S. 680,694 n.11 (1980). See also, Power Reactor Developmentr Co. v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396,409 (1961) (it is "shaky

business to attribute significance to the inaction of Congress.")

It is by no means clear that the "countermeasures" category constituted a valid administrative designation of particular "arms, ammunition and implements of war", even under the predecessor Mutual Security Act, which did not require that the Executive prepare a discrete list of munitions. The reported decisions interpreting that Act do not address the "countermeasures" listing.

Section 2778(a)(1) of the AECA does affirmatively envision and require that the President designate "items" which "so designated shall constitute" the List. This language is prospective, anticipating future executive action.

2. Absence of Reasoned Agency Interpretation

The Court of Appeals' premise that "countermeasures" constitutes a de facto "interpretation" of the enabling statute's itemization requirement is improper in the context of a criminal proceeding. It is to such "differing agency interpretation", says the court, that the "general understanding" of what the word "item" means "must yield" (A. 11a). In fact, there is no "agency interpretation" here. The reference to "full meaning" as encompassing " ... expansive and sometimes even bizarre meanings ..." may not constitutionally be applied to enforcement of a criminal statute, Adamo Wrecking Co. v. U.S., 434 U.S. supra at 285.

It is undisputed that the

"countermeasures" designation antedates passage of the AECA by many years. Nothing has been suggested indicating that the administrator even addressed the question whether "countermeasures", or indeed any other List designation, is or is not an "item". Absent are the established factors weighing in favor of judicial deference, Skidmore v. Swift & Co., 323 U.S. 134,140 (1944). As the Court noted in Adamo Wrecking Co. v. United States, supra, 43 U.S. at 287 n.5, "the mere promulgation of a regulation, without a concommitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade' as to the existence of such authority."

"Countermeasures" does not constitute a contemporaneous interpre-

tation of the AECA. A custom of the administrative department, however long construed by successive officers, must yield to the positive language of the statute." Houghton v. Payne, 194 U.S. 88, 99-100 (1904). See also, Escondido Mut. Water Co. v. LaJolla Indians, ____ U.S. ____ , 80 L.Ed. 2d 753, 765 n.22 (1984). As the District Court below ultimately observed: "Nor does any degree of deference allow the court to reach the conclusions that the term 'contermeasures' constitutes an 'item'". (A 58a). Any doubt, assuming there is any, has to be resolved in favor of defendants, not the government. See also, United States v. Laub, 385 U.S. 475,480, 486-487 (1967) (this Court affirmed the dismissal of an indictment for violation of an unauthorized regulation holding that

the enabling act had to be "narrowly construed" in the criminal context, and that "(c)rimes are not to be created by inference"). The District Court properly resolved any doubt in interpreting the itemization requirement in favor of defendant.

P O I N T II

THE REGULATION DESIGNATION VIOLATES THE DELEGATION AND SUBDELEGATION DOCTRINES AND VIOLATES DUE PROCESS.

(a) INTRODUCTORY STATEMENT

AECA, 22 U.S.C. section 2778 (1982) requires the President to designate "items" to be included in a list of defense articles whose sale and exportation are restricted. Section 2778(f) requires the President to periodically review the "items" on the list to determine "what items, if any,"

no longer warrant controls. He is to report such review to appropriate bodies of both houses, such report to be submitted at least thirty days "before any item is removed" from the list, and shall describe the nature of the controls to be imposed "on that item" under the EAA Act of 1979.

When the list was promulgated, 22 C.F.R. section 121.01 (1984), Category XI, Subsection (a) read in part: Electronic Equipment ... including but not limited to the following items: "(1) ... active and passive countermeasures and counter-countermeasures ...". The word "item" is not defined in the Statute nor in the regulations.

The issue is whether the President by calling "active and passive countermeasures and counter-

countermeasures" an "item" makes them such in the context of the Statute and, if so, whether such a delegation and subdelegation (the President didn't create the list himself, nor need he, 3 U.S.C. 301) contravenes due process in the framework of the instant criminal indictment. Though raised below, this issue was not the basis of the trial court's dismissal of the indictment; nor was it considered by the Third Circuit in reversing the trial Court.

(b) THE CONSTITUTIONAL DOCTRINES OF DELEGATION AND SUBDELEGATION.

Professor Davis summarized decades of federal due process delegation law in one brief paragraph by saying:

> "Congress may and does lawfully delegate legislative power to administrative agencies. The Supreme Court has said many times -- more

than a hundred -- that standards are required, but it has often held that standards are not required. The Supreme Court throughout the twentieth century has upheld congressional delegations without standards, and except for two 1935 decisions, it has never held unconstitutional any delegation to an administrative agency. Since 1935 the nondelegation doctrine has had no reality in the holdings, although remnant of the doctrine persist in judicial verbiage.

The law allowing delegation of rulemaking power to administrative agencies is clear law, sound law, and necessary law. It is sure to continue, for the kind of government we have developed could not operate without it. But the law allowing delegation of power to exercise unguided discretion in individual cases is in need of reexamination. The nondelegation doctrine, as proposed in section 3:15, can and should be given new life by altering it to require either statutory or administrative standards to guide the exercise of

> discretionary power in individual cases. The purpose of a reconstituted nondelegation doctrine should be to protect private parties against injustice that grows out of unnecessary and uncontrolled discretionary power. See, Section 3:15 below.
>
> 1 Davis, Administrative Law Treatise, 2nd Ed., section 3:1, p.149.

His concluding reference to section 3:15 at p. 206, et seq. transforms the non-delegation doctrine into a meaningful proscription of arbitrary discretionary conduct by administrative personnel. Due process protection shifts from "standards" to administrative safeguards.

As applied at bar, the broad standards of section 2778, that is the "furtherance of world peace" and the furtherance of the "security and

foreign policy of the United States" becomes meaningful and controllable, notwithstanding the broad delegation to the President of the power to create the list -- so long as the list is one of "designated" "items" (The items so designated shall constitute the U.S. Munitions List, section 2778(a)(1)) rather than broad categories which can be interpreted, construed and enforced by the agency in its own arbitrary or abusive way. There is neither statutory nor administrative safeguards in designations of "categories". There is no protection against bias or favoritism or unfairness in the administration of the export list if one must look, item by item, to the administrators to see if the item is one in the category of "active and passive countermeasures and

counter-countermeasures".

In short, those authorities cited in Davis' treatise support the need for certiorari in the case at bar. This is uniquely so because criminal (as distinguished from the more usual administrative) consequences flow from the acceptance of the Third Circuit's conclusion that the term "item" suffices to control the subject enumeration in the list. This case combines the delegation concept with the unique subdelegation instance and there is a direct crossing of the separation of powers. Though the crossover, per se, is now well accepted, Davis, supra, section 3:16, the very broad scope of the AECA, where there is a crossover to the President, warrants assurance that it is

accompanied by adequate controls on the subsequent administrative behavior. This need for control (item means item, not category) is found in section (f) and parallels the requirements in section 2776(a)(4)(A),(B) and (C).

P O I N T III

A MAN OF COMMON INTELLIGENCE WOULD NOT UNDERSTAND THE DESIGNATION "COUNTERMEASURES" AS ENCOMPASSING TWTAs, THEREFORE THE INDICTMENT SHOULD BE DISMISSED.

The indictment at bar charges a conspiracy to violate AECA by arranging for the exportation of defense articles which are particularized in a non-charging part of the indictment as TWTAs. TWTAS do not appear on the list.

The Circuit Court and the Trial

Court indicated in dicta with respect to vagueness "... it could not determine before trial 'whether or not wave tube amplifiers are reasonably encompassed within the term 'countermeasure' in the eyes of the average arms exporter.' The district court's ruling is consistent with U.S. v. Swarovski, 592 F. 2d 131 (2d Cir. 1979). In ruling on a similar challenge to the Munitions List, the court said: 'We are dealing here with a regulation of limited scope aimed at a small and relatively sophisticated group of persons.'" (A 5a)

The designation "countermeasures" identified by the Government as the "items" for which the defendants are being subjected to criminal liability is in the same class as the "gang"

found impermissible as a classification for criminal liability in Lanzetta v. New Jersey, supra or the contemptuous treatment of the United States flag in Smith v. Goguen, 415 U.S. 566 (1974).

This court in Goguen stated:

> "The statutory language under which Goguen was charged, however, fails to draw reasonably clear lines between the kinds of non-ceremonial treatment that are criminal and those that are not. Due process requires that all 'be informed as to what the State commands or forbids.' Lanzetta v. New Jersey, 306 U.S. 451,453, 83 L.Ed 888, 59 S.Ct. 618 (1939) and that 'men of common intellgience' not be forced to guess at the meaning of the criminal law. Connally v. General Construction Co., 269 U.S. 385,391, 70 L.Ed 322, 46 S.Ct. 126 (1926)". 415 U.S. at 574.

The Court goes on to criticize the "standardless sweep" of the statutory

language noting "legislators may not so abdicate their responsibilities for setting the standards of criminal law" (415 U.S. at 575).

It is suggested at bar in the language of Goguen, supra, that:

> "Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process", 415 U.S. at 576.

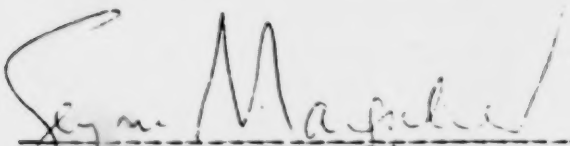
It should not matter for enforcement purposes whether the legislature intended the prohibition of conduct against a select group or not; the law must be applied uniformly.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ of certiori should be granted.

Respectfully submitted

MARGULIES, MARGULIES & WIND
A Professional Corporation



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SEYMOUR MARGULIES
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ROBERT E. MARGULIES
On The Petition

October 25, 1985

APPENDIX

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5693

UNITED STATES OF AMERICA,
Appellant

v.

DA-CHUAN ZHENG, KUANG-SHIN LIN, JING-LI ZHANG, DAVID TSAI, ALLEN YEUNG,
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Criminal Nos. 84-00064-01/2/3/4/5)

Argued May 1, 1985

Before: SEITZ, WEIS, and ROSENN,
Circuit Judges

(Filed July 19, 1985)

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OPINION OF THE COURT

WEIS, *Circuit Judge.*

The government contends that in dismissing an indictment the district court adopted an unduly restrictive definition of the word "items." The term appears in a statute that requires the President to designate "items" to be included on a list of defense articles whose sale and exportation are restricted. We conclude that the list as prepared by the Executive complied with the congressional direction. We will therefore vacate the district court's order.

In a one count indictment, defendants were charged with having conspired to violate the Arms Export Control Act, 22 U.S.C. § 2778 (1982), by arranging for the unlawful purchase and export of "defense articles" included on the United States Munitions List, 22 C.F.R. § 121.01 (1984). Finding

that the listing cited by the government did not have the specificity required by the Act, the district court dismissed the indictment.[1]

According to the criminal complaint underlying the indictment, defendants met with an undercover customs agent on several occasions and discussed the purchase of certain high technology equipment, including "English Electric Valve Co. Travelling Wave Tube Amplifier Chains and Watkins-Johnson, Inc. Travelling Wave Tube Amplifiers." After acquisition, these devices were to be shipped to the Peoples Republic of China.

The customs agent informed defendants that the devices "could not be sold without an export license and further that he could not obtain the necessary licensing." Defendants persisted, explaining that they would pay the agent for the risks incurred. After the details of the plan were agreed on, defendants were arrested and charged with conspiracy.

Shortly after arraignment, defendants filed a motion to dismiss, contending that the statute and regulations were impermissibly vague. The government responded that the wave tube amplifiers were "active and passive countermeasures" included on the Munitions List and that defendants were aware that it was unlawful to export the equipment without a license. Concluding that the vagueness issue could not be resolved until certain facts were established, the district court deferred ruling on this motion.

Defendants then filed a second motion to dismiss, this time contending that the Munitions List designation "countermeasures" was a generic term which did not comply with the Arms Export Control Act's requirement that the President designate

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1. The district court opinion is published at 590 F. Supp. 274 (D.N.J. 1984).

"items." Observing that this argument was conceptually distinct from the vagueness challenge made in the first dismissal motion, the district court examined the merits of the defendants' position.

The court noted that Congress had authorized the President to "designate those items which shall be considered as defense articles, and that once so designated, the items became controlled exports. At the outset of its analysis, the court stated "that the term 'countermeasure' does not constitute an 'item.'" In support of this conclusion, the court set out the dictionary definition of "item" and reasoned that even in the context of the Munitions List, "countermeasures" comprised a "'group of related particulars and items' and not the 'individual particular or detail' itself." In the court's view, countermeasures "clearly is not an 'item' but a category or classification which includes a variety of items."

The court determined that Congress had used the word "item" to obtain greater particularity in the Munitions List so as to facilitate congressional oversight and "increase the quality of notice available to potential exporters." Holding that the congressional use of "items" required more specificity than the court attributed to "countermeasure and counter-countermeasures," it concluded that the terms were a "nullity," which could not serve as a basis for a crime. Therefore the indictment was dismissed.

On this appeal, the government contends that the district court erred in finding a congressional intent to require a more particularized list, in failing to give appropriate deference to the administrative interpretation, and in misconstruing the plain meaning of the word "items."

At the outset, it is important to put aside the vagueness issue. In their initial motion to dismiss, defendants argued that the statute was

unconstitutionally vague because it failed to put them on notice that the wave tube amplifiers were covered by the Arms Export Control Act. The district court carefully analyzed the defendants' contention, which was limited to wave tube amplifiers and not to other articles included on the Munitions List. Thus, defendants did not argue that the statute was vague on its face, but rather that "countermeasures" was too broad a term. The government responded that to anyone dealing in these devices, the designation is unambiguous.

The court declined to rule "absent the resolution of certain disputed facts," commenting that it could not determine before trial "whether or not wave tube amplifiers are reasonably encompassed within the term countermeasure in the eyes of the average arms exporter." The district court's ruling is consistent with *United States v. Swarovski*, 592 F.2d 131 (2d Cir. 1979). In ruling on a similar challenge to the Munitions List the court said: "We are dealing here with a regulation of limited scope aimed at a small and relatively sophisticated group of persons." 592 F.2d at 133.

In passing on the defendants' second motion, the court did not revise its earlier vagueness decision, and consequently, that issue is not before us. We must assume in the present posture of the case that the statute is not unconstitutionally vague in the sense that it failed to give defendants notice that their conduct was illegal. For purposes of this appeal, we also assume without deciding that "Travelling Wave Tube Amplifiers" are "countermeasures."

The district court, however, did change its position on the defendants' assertion that "countermeasures" as designated in the Munitions List did not constitute an "item." In its earlier opinion, the court had said, "This may be true. However, unless

such generic categories are under the statute vague, such violation does not comprise a ground for dismissal of the indictment."

At the time of the first motion, the court did not distinguish between the generic category contention and the vagueness defense. In its opinion on the second motion, the court did separate the two issues. It is to the question of statutory compliance that we now turn.

A brief history of the Munitions List is important in resolving the question presented here. Following World War II and continuing to the present time, Congress enacted a series of statutes providing economic and military aid to foreign countries, as well as regulating exports and imports of military and naval equipment. Some provisions pertain to country-to-country sales, others only to commercial transactions. Most of the legislation has no direct bearing on the issues presented in this case but only serves to establish the framework in which the few relevant provisions must be placed.

The Mutual Security Act of 1954, 68 Stat. 832, marked the beginnings of the United States Munitions List. Section 414 of that Act entitled "Munitions Control" authorized the President to control the commercial import and export of "arms, ammunition, and articles of war." To implement the legislation, the President was empowered to "designate those articles which shall be considered as arms, ammunition, and implements of war, including technical data relating thereto, for purposes of this section." 68 Stat. 848.

In 1968, Congress enacted the Foreign Military Sales Act, 82 Stat. 1320, requiring, *inter alia*, that the Secretary of State report all exports "of significant defense articles on the United States munitions list." 82 Stat. 1326. Although the reporting requirement was new, Congress expressly disclaimed any intention

to affect § 414 of the 1954 Act. 82 Stat. 1326. Also, it should be noted that throughout the 1968 Act, Congress used the term "defense articles and defense services" instead of "arms, ammunition, and implements of war." *See* 82 Stat. 1322-25.

The Foreign Military Sales Act in turn was revised by the Arms Export Control Act of 1976, 90 Stat. 729, the legislation underlying the indictment in the case at hand. Section 414 of the Mutual Security Act of 1954 was repealed, 90 Stat. 745, but the President's authority to control commercial imports and exports through the use of the Munitions List was re-enacted as § 38, 90 Stat. 744, with some changes in the statutory language. The President was authorized to "designate those items which shall be considered as defense articles and defense services . . . and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List." 90 Stat. 744, *currently codified* at 22 U.S.C. § 2778(a) (1982).

The Act does not define "items" but does define "defense articles and defense services." For purposes of "commercial exports subject to the provisions of § 38 of this Act," 22 U.S.C. § 2778, the term "defense articles and defense services" means "those items designated by the President pursuant to subsection (a)(1) of [§ 38]." 90 Stat. 747, *codified* 22 U.S.C. § 2794(7) (1982).

The revision of the statutory language from "arms, ammunition and implements of war" to "defense articles and defense services" resulted from the terminology used throughout the 1968 Act. A Senate Report commented, "This change is merely intended to conform section 38 to the style of the other sections of the Act. It is not intended to alter the scope of items subject to export control, or the extent of such control.

under the regulations authorized by this Bill." S. Rep. No. 876, 94th Cong., 2d Sess. 42, 1976 *reprinted in* Senate Misc. Reports on Public Bills V.

Another feature of the Arms Export Control Act is its express provision for the preservation of existing regulations. "All determinations, authorizations, regulations, . . ., and other actions issued . . . under section 414 of the Mutual Security Act of 1954 shall continue in full force and effect until modified, revoked, or suspended by appropriate authority." 90 Stat. 745.[2] Thus, the existing Munitions List was to continue in effect.

At the time of the events described in the indictment, the List began by stating, "the following articles are hereby designated as arms, ammunition, and implements of war."[3] The List is organized into 22 "categories," which are designated by roman numerals. Important to the case at hand is "Category XI--Military and Space Electronics." Subsection (a) reads in part, "Electronic equipment . . . including but not limited to the following *items*: (emphasis added)

> (1) Underwater sound equipment including long towed arrays . . . search, acquisition, tracking, moving target indication and imaging radar system; *active and passive counter-*

---

2. The authority to designate the materials for inclusion on the Munitions List was delegated to the Secretary of State in 1954. *see* Exec. Order No. 10575, 3 C.F.R., 1954-1958 Comp., p. 213, 214, and this practice has continued. Exec. Order No. 11958, 42 Fed.Reg. 4311 (January 18, 1977). The List, codified at 22 C.F.R. § 121.01 (1984), has been revised recently. *See* 49 Fed.Reg. 47682 (December 6, 1984).

3. The recent revision has changed this language to conform to the statutory wording of "defense articles and defense services." 49 Fed.Reg. at 46687. *See also* 50 Fed.Reg. 12787 (April 1, 1985) (technical amendments).

> *measures, counter-countermeasures;* electronic fuses, identification systems; command, control and communication systems, and regardless of designation, any experimental or developmental electronic equipment specifically designed or modified for military application, or for use with a military system. . . ." (Emphasis added).

The word "items" is not defined by the regulations but appears in several places. A footnote to Category VI discussing the licensing for export of a nuclear propulsion plant refers to it as an "item." Categories XI(d), XII(c), & XVI(b) refer to components, parts, etc. "except such items as are in normal commercial use." Similar references are made in the other categories, except that at times the word "article" is used instead of "item." *See* Categories IV, IX, X, & XIV.

Section 121.15 defines "end-items" as assembled systems or equipment requiring only fuel or ammunition for operation and which consist of components. "Components are items which are useful only in conjunction with an end-item."

Section 121.16 states that "items in a partially completed state such as forgings, castings . . . of any of the articles enumerated on the Munitions List . . . where they are identifiable as . . . implements of war are considered to be such articles. . . ."

Some observations should be made at this juncture. First, the word "items" appears not only in the enabling statute but in the regulations through which the power conferred has been exercised. Also "articles" and "items" are used almost interchangeably in the Munitions List. Finally, the use of "items" in the regulations was the same before and after 1976 when the Arms Export Control Act substituted "items" for the term "articles" that had appeared in the 1954 Act.

Rather than reading the minor word substitution as signalling a substantial but unarticulated shift in

congressional policy as did the district court, we think a more modest explanation is the correct one. Congress did not choose the language in a vacuum, but made the change in the course of amending portions of the Mutual Security Act -- a 22-year-old statute which had developed its own appendage of regulations. The Munitions List had been in existence for many years, and Congress referred to it specifically in the Arms Export Control Act in 1976. Consequently, there is no doubt that Congress was well acquainted with the format of the List and the terminology it employed.

As noted earlier, the List used the words "articles" and "items" almost interchangeably. It is not surprising then, nor do we consider it significant, that the word "items" was selected to replace "articles" when Congress changed the designation of "arms, ammunition, and implements of war" to "defense articles and defense services." Adoption of terms used in the regulations or avoidance of repetition in the same sentence are far more likely reasons for substitution of the words than is the announcement of the major policy change, which the district court perceived.

The legislative history of the 1976 Act does not demonstrate any congressional dissatisfaction with the use of the word "item" in the List nor any disagreement with the degree of specificity.[4] The histories of the earlier statutes, the Mutual Security

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4. Although subsequent legislative developments are not considered especially probative, we note that in the International Security Act of 1980, 94 Stat. 3137, Congress' use of "items" is consistent with the breadth attributed to the term by the President in the Munitions List. Section 108 of the 1980 legislation is captioned "Export Controls on Certain Items on the Munitions List." It then refers in several instances to "defense articles and defense services on the United States Munitions List." 94 Stat. 3137.

Act and the Foreign Military Sales Act, similarly are silent.

As the district court found, legislative developments since 1976 express an increased congressional interest in monitoring export controls. The President has been directed to exercise his authority under § 38 to achieve coordination with export controls authorized under the Export Administration Act of 1979. 50 U.S.C. App. § 2416(b); 22 U.S.C. § 2778(e). But we must observe that although greater precision in the Munitions List would facilitate reporting as well as legislative oversight, Congress has not directed the President to be more particular in designating "defense articles" nor has it even addressed the contents of the List. Accordingly, we do not agree with the district court's assumption that these later legislative developments have great significance in demonstrating the degree of specificity the word "items" connotes.

In most situations, the plain language rule is the preferred method of statutory interpretation. *Perrin v. United States*, 444 U.S. 37, 42 (1979). However, when the subject matter is a technical one and is entrusted to the executive, the general understanding must yield if a differing agency interpretation is reasonable and does not contradict the expressed intent of Congress. *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 52 U.S.L.W. 4845, 4847 (1984); *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978).

In the case at hand, the dictionary definition relied on by the district court is of little value because "items" is a relative term whose contours are constructed by context. Only when measured by the remaining particulars in a given classification can one discern whether a designation is an item. Thus, we are left, as was the President, with determining the meaning of "items" as used in the statute without an

accompanying list of associated particulars. That being so, reasonable persons could differ on the degree of specificity inherent in the term.[5]

Absent even a clue from Congress on how much precision was to be used in preparing the Munitions List, the President should be given wide latitude in interpreting the delegation of authority and formulating regulations. Implicit in the descriptions used to designate the "defense articles and defense services" is an Executive conclusion that specific nomenclature was not required and that more generic identification was acceptable.

Because we can find no contrary suggestion in the legislation or its history, the question is whether the "agency's answer is based on a permissible construction." *Chevron*, 52 U.S.L.W. at 4847. Given the limited nature of the inquiry, we cannot say that "items" demands more precision than that discerned by the President. Indeed, as we have already observed, it appears that the more plausible explanation for the Congressional choice of "items" was consistency with the use of that term in the Munitions List.

According some deference to the Executive in this circumstance does not interfere with the principle that criminal statutes are to be narrowly construed. Strict construction does not mean that every federal criminal statute must be given the narrowest possible meaning. *See Barrett v. United States*, 423 U.S. 212 (1976); *United States v. Campos-Serrano*, 404 U.S. 293 (1971).

Nor does *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283 (1978), suggest a contrary

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5. It is interesting that the dictionary does contain a much simpler explanation of the word that corresponds to our more detailed exposition. "Item applies chiefly to each thing in a list of things or in a group of things that lend themselves to listing." Websters Third International Dictionary (1968).

conclusion. That case, while it supports the proposition that the President's mere designation of "countermeasures" and "counter-countermeasures" as "items" is insufficient "to foreclose further inquiry," also reaffirms the principle that deference to the executive "is entirely appropriate under ordinary circumstances." *Id.* at 288. Furthermore, we are not dealing with a possible absence of executive power.

There is no dispute in this case about whether the wave tube amplifiers could be placed on the List. Thus, unlike cases applying strict construction to avoid extending the reach of a criminal statute, here the principle "is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings." *United States v. Hartwell*, 73 U.S. (6 Wall) 385, 396 (1867). *See also Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 592 & n.4 (3d Cir. 1979) (A "word means what the statute says it means." and "That the law should attribute expansive and sometimes even bizarre meanings to a word is not a novel phenomenon.")

Even if we were dubious about the reasonableness of the President's more expansive interpretation of "items" and were inclined to give that term a narrower meaning, the present record does not demonstrate that "countermeasures and counter-countermeasures" do not constitute items.

Category XI lists highly specialized electronic equipment used for particular military purposes. In that context "countermeasures" obviously has some meaning peculiar to that category and is shaped by its technical environment.

In the 1975 version of the Munitions List, Category XI(a) read, "Electronic equipment assigned a military designation including but not limited to, the following items: radar, active and passive countermeasures, counter-countermeasures. . . ." In 1977, the category

was amended as quoted earlier to list various sonar devices and more specific types of radar, again followed by "countermeasures." Thus, the listing suggests that countermeasures is a term of art having reference to radar.

We have little doubt that had "radar jamming devices" been used instead of "countermeasures," the district court would have accepted that designation. On the present record, we are not satisfied that in the military electronics field "countermeasures" does not mean radar jamming devices and hence is as much an "item" as a nuclear propulsion plant. In that event the statutory direction has been complied with, and the basis for the defendants' motion falls.

We conclude that "countermeasures" and "counter-countermeasures" are appropriate designations of "items" for inclusion on the Munitions List, and therefore the indictment must be reinstated. Accordingly, the order of the district court will be vacated and the case remanded for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATE COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 84-5693

UNITED STATES OF AMERICA,
Appellant

vs.

DA-CHUAN ZHENG, KUANG-SHIN LIN,
JING-LI ZHANG, DAVID TSAI,
ALLEN YEUNG,
Appellees

(D. C. Crim. Nos. 84-00064-01/2/3/4/5)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE ---------
DISTRICT OF NEW JERSEY

Present: SEITZ, WEIS, and ROSEN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ------ District of New Jersey and was argued by counsel May 1, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered July 31, 1984 and made final by the order entered Oc tober 10, 1984, be, and the same is hereby vacated and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:
/S/ M. Elizabeth Ferguson
Chief Deputy Clerk

July 19, 1985

Certified as a true copy and
issued in lieu of a formal
mandate on Septembr 4, 1985.

Test: /S/ M. Elizabeth Ferguson
Chief Deputy Clerk, United States
Court of Appeals for
the Third Circuit.

UNITED STATE COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 84-5693

UNITED STATES OF AMERICA,
Appellant

vs.

DA-CHUAN ZHENG, KUANG-SHIN LIN,
JING-LI ZHANG, DAVID TSAI,
ALLEN YEUNG,
Appellees

(D. C. Crim. Nos. 84-00064-01/5)

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ,
ADAMS, HUNTER, WEIS, GARTH,
HIGGINBOTHAM, SLOVITER,
BECKER, STAPLETON, MANSMANN,
and ROSENN, Circuit Judges,

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in

regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Gibbons did not participate in the consideration of this matter.

BY THE COURT,

/S/ Weis

Circuit Judge

DATED: Aug. 27, 1985

APPENDIX II

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal No. 84-64
Plaintiff	:	OPINION
vs.	:	
	:	ORIGINAL FILED
DA-CHUAN ZHENG, KUANG-SHIN LIN, DAVID TSAI, KWON ALLEN YEUNG, and JING-LI ZHANG,	:	JULY 26, 1984
Defendants.	:	

SAROKIN, District Judge

The court here confronts a difficult and highly technical problem involving the propriety of regulations implementing a criminal statute. Underlying this specific issue, however, are more fundamental principles regarding the creation of criminal liability, the extent to which a defendant's subjective belief in the

criminality of his or her acts affect such liability, and the compliance by the Executive branch with congressional directives regarding what may be made a crime and what may not.

On February 23, 1984, defendants Da-Chuan Zheng, Kuang-Shin Lin, David Tsai, Kuang Allen Yeung and Jing-Li Zhang were charged in a one-count indictment with conspiracy to violate the Arms Export Control Act, 22 U.S.C., Section 2778 ("the Act"), and regulations promulgated pursuant thereto, all in violation of 18 U.S.C., Section 371. In particular, the indictment alleges that defendants conspired to arrange for the export of certain radar jamming devices, known as wave tube amplifiers, to the People's Republic of China. The arrest of defendants

culminated an approximately two-week long undercover investigation conducted by the United States Customs Service.

By opinion filed May 23, 1984, the court addressed defendants' various pretrial motions. One such motion sought dismissal of the indictment in this matter on the grounds of the vagueness of the Act and the regulations promulgated pursuant thereto. 22 C.F.R. Section 121.01 et seq. ("the Munitions List"). Defendants argued that the section of the regulations within which the government claims wave tube amplifiers fall, 22 C.F.R. Section 121.01, Category XI(a)(1)(d) (naming "active and passive countermeasures and counter-countermeasures" or "components" thereof), was unconstitutionally

vague, since, as defendants then argued "(t)o think that a person of ordinary intelligence would understand that wave tube amplifiers are prohibited items under Category XI of the Munitions List, defies logic.: Pretrial Brief of Defendant Zheng at 4. The court, however, reserved decision on this issue, because of its inability to determine "whether or not wave tube amplifiers are reasonably encompassed within the term countermeasure in the eyes of the average arms exporter." United States v. Zheng, Crim. No. 84-64, unpub. op. at 5 (D.N.J. May 23, 1984) ("Opinion"), as well as the court's duty to evaluate vagueness challenges "in light of the particular facts at hand," id. at 6, especially where specific intent is a necessary element of the offense charged. Id. at

Upon reconsideration, defendants do not, for the most part, dispute this holding. Rather, they now argue that, because Congress required that specific "items" be made apart of the Munitions List, see 22 U.S.C., Section 2778(a)(1), (Fn 1) and because this statutory mandate was ignored in designating a generic category, "countermeasures," rather than more specific items such as wave tube amplifiers, such generic category must be deemed a nullity, and the indictment based upon it dismissed.

This argument is, of course, conceptually distinct from that regarding vagueness; at issue here is the Executive's obedience or disobedience of a congressional mandate, and

not the objective clarity of the statute or regulations thus promulgated. (Fn 2) As the court noted in its opinion, such argument is irrelevant to a vagueness challenge. The court did, however, state that such argument "may" have factual merit, though it questioned defendants' standing to raise it. Opinion at 5 n.3. Upon motion for reconsideration, and supplemental briefs ordered by the court, the issue is clearly presented and thoroughly briefed for the first time. The court here addresses it, and for the reasons set forth below, dismisses the instant indictment.

First, there is no question but that the term "countermeasure" does not constitute an "item." "Item" is defined, for these purposes, as "an

individual particular or detail singled out from a group of related particulars or items." Webster's Third New International Dictionary of the English Language Unabridged (" Webster's") at 1203 (1976). "Countermeasures" or "counter-countermeasures" and their "(c)omponents, parts, accessories, attachments and associated equipment ...," 22 C.F.R., Section 121.01, Category XI(a)(1),(d), even limited to those associated with "Military and Space Electronics," and even read in the context of the paragraph in which it appears, (Fn 3) comprise a "group of related particulars and items," and not the "individual particular or detail" itself. It is true, as the govern,ment argues, that in order to be an "item", an object need not be the "'most particularized' possible thing."

Government's Supplemental Brief at 5. Indeed, the government is correct that an "jitem" need not be as specific as a "particular." As Webster's states, in discussing "item" and its synonyms:

ITEM, DETAIL AND PARTICULAR can signify one of the things, either separate and distinct jor so considered, that constitute a whole. ITEM applies chiefly to each thing in a list of things or in a group of things that lend themselves to listing. DETAIL, in this connection applies to eqch separate thing which enters into the building, form, or construction of something as a house, a painting, narrative, or operation. PARTICULAR in this connection implies a relationship with any whole and stresses that relationship more than ITEM or DETAIL,

emphasizing the smallness, singleness, and concreteness of each item or detail in the whole ... Webster's at 1203 (capitals in original) (examples omitted). Nor, however, is an "item" as broad as a "category" or "group" from which items are derived. Hence, what is an "item" and what is a "particular" on the one hand, or in a "group" on the other, is always relative. The government is correct that an "item" may always be further itemized, making it appear to be a "group" or a "category," or it may be viewed in the larger context of the group of which it is a part. Thus, to use the government's example, "horses" can be identified "as jusmpers, workhorses, racehorses and pleasure horses, or ... further "itemized" by more detailed breeds such as quarter

horses, thoroughbreds, palominos, appaloosas, Clydesdales, etc," Government's Supplemental Brief at 5. Of course, "horses" could also be thought of as "items" within the "group" of "quadripeds," "mammals" or even "living things." Which is the group and which is the item is therefore a matter of judgment and ought normally to be determined with regard to the legislative context in which the words appear.

That legislative context lends powerful support to defendants' arguments, as discussed, infra. However, the court need only rest its conclusion upon common sense. "Countermeasures" is simply too broad a description to be considered an "item"; to require greater specificity is not

to mandate undue particularization, but to require the Executive merely to promulgate a list of "items" in conformity with the Act. This conclusion derives additional authority from the fact that wave tube amplifiers, in the words of Webster's supra, "lend themselves to listing". As defendants point out, wave tube amplifiers themselves are specifically listed elsewhere in the Code of Federal Regulations, see 14 C.F.R., Section 171.323, and have been the subject of inquiry by the United States Air Force Scientific Advisory Board Ad Hoc Committee on Traveling Wave Tube Amplifiers, see 46 Fed.Reg. 7427 (January 9, 1981); 46 Fed.Reg. 14374 (February 18, 1981) (investigating wave tube amplifier reliability), and by the Department of Commerce, International

Trade Administration, see 46 Fed.Reg. 63364 (December 31, 1981)(investigating alleged dumping of wave tube amplifiers by Japanese manufacturers). Moreover, even the government admits that "wave tube amplifiers are common components of several other equipment types" described in 22 C.F.R. SECTION 121.01, CATEGORY XI(a)(1). Government's Brief in Opposition to pretrial Motion by Defendants at 13.

Furthermore, although the government continues to argue that requiring the List to include such specific "items" as wave tube amplifiers "would be cumbersome and difficult" and "would be to require a list much more statis at any one point in time than would be wise in the world of fast-changing technology," Government's Supplemental

Brief at 6, such argument is undercut by the many extremely detailed sections of the list that already exist. Hency, for example, the "chemical agents" listed in Category XIV(a) are specified in excruciating detail in 22 C.F.R., Section 121.09, and even such terms as "vessels of war" and "aircraft" are defined with extraordinary specificity in 22 C.F.R., Sections 121.13, 121.14. Moreover, the face of the list, while not perfect, is replete with designations fare more specific than "countermeasures." Within Category XI itself, terms like "simple fathometers" or "electro-mechanical beam former sonars and elemenary sonobuoys" certainly describe "items", without apparently sacrificing the practicability or flexibility of the List. 22 C.F.R. Section 121.01, Category

XI(b). 32a

Even "aerial cameras, space cameras, special purpose military cameras, and specialized processing equipment therefor ...," 22 C.F.R. Section 121.01, Category XIII(a), is a listing far more specific than "countermeasures," and obviously adequate under the Act. See United States v. Swarovski, 595 F.2d 121 (2d Cir.1979). In sum, the court is convinced that the Munitions List could describe "items" within the category that is "countermeasures without unduly burdening the Executive responsible for constituting the list or preventing modification thereof on a reasonably frequent basis.

The Act requires that the United States Munitions List be composed of

items. By its terms:

> The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.

22 U.S.C., Section 2778(a)(1) (emphasis added). Similarly, the most recent amendment to the Act provides:

> The President shall periodically review the items on the United States Munitions List to determine what items, if any, no longer warrant export controls under this section. The results of such reviews shall be reported to the Speaker of the House of Representatives and to the Committee on Foreign Relations and the Committee on Banking, Housing and Urban Affairs of the Senate. Such a report shall be submitted at least 30 days before any item is removed from the Munitions List and shall describe the nature of any controls to be imposed under the Export Administration Act of 1979 (50 U.S.C.App 2401 et seq.) (emphasis

added).

It is thus clear that the United States Munitions List is to be composed of "items", which items are themselves to be subject to periodic review and, if appropriate, deletion from the list. Additionally, the Executive must make quarterly reports of all export licenses issued for "major defense equipment, by category, sold for $1,000,000 or more," which reports are to list

> (A) the items to be exported under the license,
>
> (B) the quantity and contract price of each such item to be furnished, and
>
> (C) the name and address of the ultimate user of each such item.

22 U.S.C. Section 2776(a)(4) (emphasis added).

The congressional mandate that the

Munitions List be composed of "items" is not coincidental. For example, the commodity control list, which is to be promulgated by the Secretary of Defense according to the terms of the Export Administration Act of 1979, does not require a listing of "items," but rather "a list of all goods and technology ... clearly identified as being subject to controls under this section." 50 U.S.C.App. Section 2404(c)(1). That the Export Administration Act speaks in the broader terms of "goods and technology" throughout is further consistent with that Act's less stringent reporting requirements: rather than the quarterly requirements imposed by the Arms Export Control Act, 22 U.S.C. Section 2776(a)(4), the Secretary of Defense need only report on "general licensing

activities," and other aspects of the administration of the Export Administration Act annually. 50 U.S.C.App Section 2413. Similarly, while no reporting requirements are imposed upon the Secretary of Defense who wishes to delete goods or technology from the commodity control list, prior to such deleter, see 50 U.S.C.App. Section 2404(c)(3),(g), the President must alert Congress thirty days before an item is removed from the Munitions List. 22 U.S.C. Section 2778(f) Hence, it is clear that Congress demanded particularly rigorous oversight of the Munitions List: one of the ways it did this was by requiring that the list be made up of discrete items, as to which the strict review mandated was far more practicable (Fn 4).

More important, perhaps, are the goals that these two acts share. The Export Administration Act of 1979, 50 U.S.C.App. Section 2401, et seq. had the effect of amending various portions of the Arms Control Export Act, 22 U.S.C. Section 2778(e). That Act also stated that

> The authority granted to the President in this Act shall be exercised in such a manner as to achieve effective coordination with the authority exercised under section 38 of the Arms Control Export Act (22 U.S.C. 2778). 50 U.S.C.App. Section 2416(b). See also 22 U.S.C. Section 2778(e)

The legislative history of the Export Administration Act demonstrates that one of its primary purposes was to keep the number of goods and technologies upon which export limitations were to be imposed to a minimum to "provide authority to

control exports where necessary, but also (to) ensure that such authority is exercised with maximum efficiency and controls are confined to those necessary to achieve the purposes of the act". S.Rep. No. 96-169, 96th Cong., 1st Sess. at 2 (1979), quoted in U.S.Code Cong. & Adm. News 1147,1148-49 (1979). The legislation was said by the Senate to be

> necessary to improve the efficiency of export licensing and to provide for periodic and systemic review and revision of export control policy to insure that controls are achieving their intended purposes, are not excessive, and are focused on items for which export control is most in the national interest.

S. Rep. No. 96-169 supra, at 2. U.S.Code Cong. & Admin.News 1979 p. 1148. The necessity for this legislation stemmed, at least in part, from the fact that

> Uncertainty over U.S. policy toward the use of export controls for foreign policy purposes has discouraged potential exports and tarnished the reputation of U.S. exporters as reliable suppliers to foreign countries. Controls applied for foreign policy reasons often restrict the export of goods and technology freely availabe from foreign suppliers, often from our allies. Yet there is no evidence that the effects of such controls are receiving due consideration, nor that efforts are being made to obtain agreement by our allies to adopt similar restrictions on their exports.

S.Rep. No. 96-169, supra, at 3, U.S.Code Cong. & Admin.News 1979, p. 1149. Hence, the Export Administration Act was clearly designed to assure that export controls be, in the words of former Under Secretary of State George Ball, "used very sparingly." Id. at 6. See also House Conference Report No. 96-482, 96th Cong., 1st Sess., quoted in, U.S.Code Cong. & Adm. News, supra at 1180. Both this Act and the Arms

Control Export Act were to be administered accordingly. With respect to the Export Administration ACt, such administration reuqired the Executive Branch to utilize certain criteria when "jimposing, expanding, or extending export controls under this section", 50 U.S.C.App. Section 2405(b)(Fn 5), and to consider other factors in deciding whether to grant "hardship relief from such controls. 50 U.S.C.App. Section 2411(e). With respect to the Arms Control Export Act, both a limitation upon the scope of the statute and the notice to be given by it were to be enhanced by the requirement that "items" be listed, rather than either the "goods or technology" of the Export Administration Act or the "articles which shall be considered as arms, ammunition and implements of war" of

the predecessor to the Arms Export Control Act. 22 U.S.C. Section 1934 (Fn. 6).

In sum, the court concludes that congressional use of the term "item" engendered a purposeful choice of words. It meant to enhance the detail of the Munitions List, making possible greater congressional oversight of the Executive in this area. It also meant to increase the quality of the notice available to potential exporters, and thereby remove unnecessary barriers to exporting goods which might arise from the chilling effect that necessarily attends less clear regulation (Fn 7). Thus, important social policies were to be served by the use of the term "item" in the Act. The question that remains is the effect of the Executive's

failure to name as an "item" the defense article which defendants allegedly conspired to export without a license.

(1) Where the Executive fails to adhere to the statutory mandate applicable to his or her actions, the actions thus taken or regulations thus promulgated are rendered "a nullity". United States v. Larionoff, 431 U.S. 864,873 and n. 12, 97 S.Ct. 2150, 2156 and n. 12, 53 L.Ed.2d 48 (1977), citing Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134, 56 S.Ct. 397, 400 80 L.Ed. 528 (1936). See also Campbell v. Galeno Chenmical Co., 281 U.S. 599,610, 50 S.Ct. 412,415, 74 L.Ed. 1063 (1930); Atchison, Topeka & Santa Fe Railway Co., 607 F.2d 1199, 1203 (7th Cir.

1979); City of Santa Clara v. Andrus, 572 F.2d 660, 677 (9th Cir. 1978); United States v. Silva, 272 F.Supp. 46, 49-50 (S.C.Cal. 1967). As such they may not support a prosecution. See, e.g., Adamo Wrecking Co. v. United States, 434 U.S. 275, 98 S.Ct. 566, 54 L.Ed.2d 538 (1978) (regulation exceeding congressional mandate); McKart v. United States, 395 U.S. 185, 189-92, 89 S.Ct. 1657, 1660-62, 23 L.Ed.2d 194 (1969) (administrative action exceeding congressional mandate). Cf. United States v. Gurrola-Garcia, 547 F.2d 1075, 1077 (9th Cir.1976) (22 C.F.R. Section 127.01 would not serve as a basis for conviction if it extended or modified the predecessor to the Act, which it did not do in this case). This is true whether the regulation or action at

issue is substantive, see, e.g., Adamo Wrecking Co., supra, 434 U.S. at 285, 98 S.Ct. at 573 (question of what comprises an "admission standard" under the Clean Air Act); United States v. W.T. Rawleigh Co., 267 F.2d 180, 184 (7th Cir.1959) (interpretation of Internal Revenue Code, and regulations), or procedural. See, e.g. United States v. Finley Coal Co., 493 F.2d 285, 291 (6th Cir.), cert. denied, 419 U.S. 1089, 95 S.Ct. 679, 42 L.Ed.2d 681 (1974) ("(a)dministrative rule-making in disregard of procedural requirements is ultra vires"), citing Texaco, Inc. v. Federal Power Commission, 412 F.2d 740, 746 (3d Cir.1969); Hotch v. United States, 212 F.2d 280, 283-84 (9th Cir.1954).

Here, as defendants argue, it is

both. In failing properly to "itemize", the Executive did not make the unlicensed export of wave tube amplifiers, or other items within the category "countermeasures." a crime under 22 U.S.C. Section 2778(c); this is a substantive failing akin to that requiring dismissal of the indictment in Adamo Wrecking, supra. Arguably, the Executive also failed to promulgate the pertinent regulations in their proper form; this was a procedural shortcoming, similar to that resulting in nullification in Finley Coal (Fn 8). These failings, which the government characterizes as based upon a "hypertechnical and artifical ... reading of the word "item", Government's Supplemental Memorandum at 8-9, are fatal in the cirminal context, where the rule is that "where there is

ambiguity ..., doubts are resolved in favor of the defendant." Adamo Wrecking Co., supra, 434 U.S. at 285, 98 S.Ct. at 573, citing United States v. Bass, 404 U.S. 336, 348, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971). See also United States v. Laub, 385 U.S. 475, 480, 486-87, 87 S.Ct. 574, 580-81, 17 L.Ed.2d 526 (1967) (statute did not authorize area restrictions which could not, therefore, support an indictment); United States v. Eaton, 144 U.S. 677, 687-88, 12 S.Ct. 764, 767, 36 L.Ed. 591 (1892). Nor, in situations such as these, are administrative regulations entitled to their normal presumption of regularity, as argued by the government. See, e.g. SEC v. Sloan, 436 U.S. 103, 117, 98 S.Ct. 1702, 1711, 56 L.Ed.2d 148 (1978); Weyerhaeuser Co. v. Costle, 590 F.2d

1011, 1027 (D.C.Cir. 1978); United states v. Finley Coal Co., supra, 493 F.2d at 290-91. Cf. McKart v. United States, supra, 395 U.S. at 197-99, 89 S.Ct. at 1664-65 (exhaustion of administrative remedies not required where statutory interpretation is at issue) (Fn 9).

(2) This analysis leads the court to but one conclusion the terms "countermeasures, counter-countermeasures" in 22 C.F.R. Section 121.01, Category XI(a)(1) are a nullity. As they are the basis for the instant indictment, such indictment must in turn be dismissed. This is true irrespective of defendants' knowledge, belief or actual subjective understanding of the wrongfulness of their acts, for what is not a crime

cannot be made one simply by virtue of one's impressions, however, accurate or misguided they may be. See Hotch v. United States, supra 212 F.2d at 284-84. Unlike the vagueness inquiry which, the court has noted, depends upon "the particular facts of the case at hand, including the conduct of the defendants," Opinion at 6 (citing cases), the issue here before the court in no way involves defendants' understanding. Rather, the question is simply one of whether the Executive has failed to comply with his or her legislative mandate. The matter is thus one of statutory construction, and not of due process, which is the basis of a vagueness challenge. See, e.g., Hoffman Estates v. Flipside, 455 U.S. 489, 497, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982). To require an

inquiry into defendants' respective states of mind would thus be to engage in non-sequitur and to inject into the issue of Executive authority the myriad beliefs of all those affected by a particular statute. No court has yet held such beliefs relevant to an analysis such as this one; this court thus concludes that the issue of defendant's standing to raise this claim is unproblematic in this context.

CONCLUSION

Although what is at issue here may appear to be a highly technical reading of a regulation implementing a criminal statute, it actually involves the fundamental principle that no person may be charged with a crime where no such crime exists. Congress authorized the President to make it a crime to

export or import certain "items" without a license, punishable by two years in prison, a $100,000 fine, or both. Until such items have been properly designated, no crime exists. There can be endless esoteric discussion as to what is or is not an item and what is or is not a classification or category of items. However, "countermeasures" clearly is not an item, but a category or classification which includes a variety of items. Therefore, the unlicensed export of "countermeasures" does not fall within the proscriptions of the Act. Since the defendants in this matter are thus charged with an act that does not constitute a crime, the court has no alternative but to dismiss the indictment. Such result is particularly mandated where Congress

has conferred upon the Executive branch the power to decree what shall constitute a crime, and has sought to assure that the notice thereby afforded would be adequate. If the Executive does not exercise that authority precisely as Congress has authorized, the conduct of persons who wish to be law-abiding may therefore be placed in jeopardy.

There is a far greater danger to a free society in construing a criminal statute too broadly rather than too narrowly. One should not be indicted, tried, and possibly convicted and punished for a crime which does not clearly exist or whose enactment has not been accomplished in a manner authorized by Congress.

The dismissal of the indictment is

thus compelled not only by the fact that one cannot be charged with a criminal violation where his or her acts doe not constituite a crime, but by the principle of separation of powers that underlies our constitutional system as well. Congress has conferred upon the Executive the power to decree what shall consitute a crime under the Act, but has decreed that such authority be exercised in a particular manner. Here, the Executive has failed to exercise his authority in the manner set forth by the statute. As the Executive's authoirity is limited to that conferred by statute, or the Constitution, such actions beyond his delegated powers must be nullified. To hold otherwise would be to sanction disobediance of the legislature,

disobedience which is all the more impermissible where the result thereof is to render certain conduct criminal without the notice specifically authorized by Congress.

Defendants' motion to dismiss the indictment is hereby granted. An appropriate order will issue.

FOOTNOTES

Fn. 1 - Title 22 U.S.C. Section 2778(a)(1) states: The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List. This section, and related provisions, are discussed in further detail, infra.

Fn. 2 - Defendants raised this issue for the first time in reply, see Reply Brief of Defendant Zheng at 3-4; Letter Brief of Defendant Zheng (5/1/84), and the matter was discussed at oral arguiment. All prior discussion took place within the context of a challenge

to the Act on grounds of vagueness.

Fn. 3 - That paragraph reads, in full: (1) Underwater sound equipment including long towed arrays, electronic beam forced sonar, target classification equipment, and spectrographic displays; search, acquisition, tracking, moving target indication and imaging radar systems, active and passive countermeasures, counter-countermeasures; electronic fuses; identification systems; command, control and communications systems, and regardless of destination, any experimental or developmental electronic equipment specifically designed or modified for military application, or for use with a military system ... 22 C.F.R. Section 121.01, Category XI(a)(1). Although the government fails so to contend, the content of this paragraph could be argued to narrow the term "countermeasures somewhat: read fairly, the term could not, for example be said to encompass anti-aircraft devices, which might also be considered "countermeasures". Nonetheless, the term "countermeasure" is not an "item". Rather it is a category, the components of which would themselves be items, perhaps including wave tube amplifiers, which served to "counter, check or offset," Webster's at 520, some military or space electronic technology.

Fn. 4 - Indeed, it is clear that congressional oversight was a motiviating factor behind the 1981

amendment to the Act which added Section 2778(f). See 1981 U.S.Code Cong. & Adm.News 2404, 2407, 2412-15 (discussing P.L. 97-113, of which Seciton 2778(f) was Section 107).

Fn. 5 - These factors were very similar to those that Congress had in mind when passing the Arms Control Export Act. See H.R. No. 94-1144, 94th Cong., 2d Sess. (1976) at 12-13 (remarks of Secretary of State Kissinger) quoted in 1976 U.S.Code Cong. & Adm.News 1378,1389.

Fn. 6 - Title 22 U.S.C. Section 1934 stated, in full: The President is authorized to control, in furtherance of world peace and the security and foreign policy of the United States, the export and import of arms, ammunition and implements of war, including technical data relating thereto, other than by a United States Governmental agency. The President is authorized to designate those articles which shall be considered as arms, ammunition and implements of war, including technical data relating thereto, for the purposes of this section.

When Congress enacted the current Arms Control Export Act, it changed, inter alia, the language "articles which shall be considered as arms, ammunition and implements of war" to "items" whiich shall be considered as defense articles and defense services." Though the parties have pointed to no legislative history behind such change

and although "item" is nearly synonymous with "article", see Webster's at 124, the structure of 22 U.S.C. Section 2778 makes it apparent that "items" are a subset of "defense articles and defense services," and thus more specific than either. In other words, because the list was to contain "items" which are "defense articles", it would make little sense to use the former term unless it were more specific than the latter. This is also consistent with Webster's, since the dictionary definition of "item" connotes a specificity which "article" does not. In any event, the change in the statute reveals an intentional movement to the word "item" in 1976.

Fn. 7 - The importance of breaking down such barriers to trade with the People's Republic of China, to which defendants sought to export wave tube amplifiers, has been reinforced by the events of the past decade, as reflected in regulatory changes. See, e.g. 48 Fed.Reg. 53064 (Nov. 23, 1983) (implementing "a more liberal export control policy toward the People's Republic of China"); 46 Fed.Reg. 60820 (Dec. 14, 1981) (deleting the People's Republic of China "from the list of countries which are denied licenses and other approvals by the U.S. Department of State for U.S. Munitions List exports").

Fn. 8 - Cases like Finley Coal describe situations in which regulations are invalidated for failure to adhere to the required procedures for rulemaking.

Such cases are applicable by powerful analogy. Here, the Executive did not adhere to the procedure for making a defense article or service part of the list: the article must be identified as one which belongs on the list, and then sufficiently specified so as to become an "item". The function of such procedure, like those in Finley Coal, is to provide the requisite notice to those potentially affected. See supra at 277-78.

Fn. 9 - The cases cited by the government all involve situations in which particular regulations were upheld by the courts as not inconsistent with the substance and purposes of the statute at issue. See, e.g., Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973) (regulations under Truth in Lending Act), citing Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280-81, 89 S.Ct. 518, 525-26, 21 L.Ed.2d 474 (1969). That is not the issue here before the court: indeed, the court might well concede that wave tube amplifiers belong on the Munitions List, and that to hold otherwise would be unduly to restrict the power of the Executive. However, in order to support an indictment and possible conviction, wave tube amplifiers must be placed on the list in the manner prescribed by the statute, as "items". Such itemization is itself consistent with the language and purposes of the statute, as discussed, supra, matters as to which

even the cases cited by the government hold the court need not defer to the administrator. See Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965) (deference is more in order when the construction of a regulation rather than the statute is at issue). Nor does any degree of deference allow the court to reach the conclusion that the term "countermeasures" constitutes an "item."

APPENDIX III

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	Criminal No. 84-64
Plaintiff,	:	
vs.	:	OPINION
DA-CHUAN ZHENG, KUANG-SHIN LIN, DAVID TSAI, KWON ALLEN YEUNG, and JING-LI ZHANG,	:	ORIGINAL FILED MAY 23, 1985 ALLYN Z. LITE CLERK
Defendants.	:	

SAROKIN, District Judge

On February 23, 1984, defendants Da-Chuan Zheng, Kaung-Shin Lin, David Tsai, Kuang Allen Yeung and Jing-Li Zhang were charged in a one-count indictment with conspiracy to violate the Arms Export Control Act, 22 U.S.C. section 2778 (the Act) and regulations promulgated pursuant thereto, all in violation of 18 U.S.C. section 371.

In particular, the indictment alleges that defendants conspired to arrange for the export of certain traveling wave tube amplifier chains and wave tube amplifiers to the People's Republic of China. The arrest of defendants culminated an approximately two-week long undercover investigation conducted by the United States Customs Service.

Defendants have made a number of pretrial motions which are now before the court. These motions challenge the constitutionality of the Act, the sufficiency of the indictment and the conduct of the government. Additionally, defendant Zheng moves for the redaction of a particular statement. These sets of motions will be discussed below, seriatim.

I. CHALLENGES TO THE STATUTE

Defendants move to dismiss the indictment on three grounds comprising constitutional challenges to the statute here at issue. First, they argue that the Act is unconstitutionally vague as applied to this case, in that it failed to put defendants on notice that the wave tube amplifiers which they sought to export were covered by it. Second, they argue that the Act works an unconstitutional delegation of power from Congress to the President. Third, they state that, in turn, the President has unlawfully subdelegated his powers from the Act to the Director of the United States Arms Control and Disarmament Agency (ACDA).

A. Vagueness (Fn.1)

A statute such as the one at issue may, of course, be held void for vagueness where it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

Kolender v. Lawson, 103 S. Ct. 1855, 1858 (1983) (citing cases).

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.

Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

Defendants do not argue that the Act is vague on its face; indeed, such

an argument might well be difficult to make where, as here, they concede that certain applications of the statute do not comprise due process violations. Reply Brief of Defendant Zheng at 5, citing United States v. Swarovski, 592 F. 2d 131 (2d Cir. 1979). See generally Hoffman Estates v. Flipside Hoffman Estates, 455 U.S. 489, 497 (1982). But see Kolender v. Lawson, supra, 103 S. Ct. at 1859 n. 8. Rather, they contend that the statute is vague with respect to whether it covers the wave tube amplifiers which defendants allegedly sought to export and, for that reason, the indictment must be dismissed. In response, the government contents first, that the regulations clearly cover these pieces of equipment; second, that because defendants knew that the equipment was

govered by the regulations, they lack standing to assert the regulation's vagueness, if any; and third, that in any event, the issue of vagueness merges with that of intent: if defendants did not know that their conduct was proscribed, then they must be found innocent at trial.

Argument as to the clarity of the regulations at issue revolves around Category XI of the Munitions List, codified at 22 CFR, section 121.01. This category covers Military and Space Electronics, and the government argues that the wave tube amplifiers which defendants sought to export --which, it is undisputed, are "pieces of electronic equipment used to jam radar signals," Government's Brief at 12--fall within such category. In

particular, the government argues that the wave tube amplifiers are "active and passive countermeasures" within the meaning of paragraph (a) (1) of Category XI, or "components, parts, accessories, attachments, and associated equipment" thereof as described in paragraph (d) of the Category. The government contents that

> To anyone dealing in these items, their classification within these sections of the Munitions List is an unambiguous as the fact that a carburetor would be encompassed by a list including "components" of "automobile engines."

Government's Brief at 13. Defendants reply that "countermeasure" is too broad a term, that it is a term susceptible of greater definition, that wave tube amplifiers are a known technology which could be specifically

named and that a generic term such as "countermeasure" does not comply with the statutory mandate that the Prsident denominate particular items of technology. Reply Brief of Defendant Zheng at 2-5. They also attach a newspaper article indicating that even the State Department is unsure of whether the wave tube amplifiers are on the Munitions List. (Fn. 2)

The court is unable to rule on these issues absent the resolution of certain disputed facts. In particular, absent fact-finding, the court cannot determine whether or not wave tube amplifiers are reasonably encompassed within the term countermeasure in the eyes of the average arms exporter. Relevant to this issue would be any doubts that the State Department had or

has as to whether the amplifiers are included on the Munitions List. That "countermeasure" could be more specifically defined to include wave tube amplifiers is irrelevant, especially given the flexible definitions of items some of which defendants concede are adequately named. See 22 CFR section 121.02-121.16 (definitions beginning with "includes", "includes inter alia" or "includes but is not limited to"); Defendant Zheng's Reply Brief at 2. (Fn 3).

Normally, therefore, the court would have to decide these issues after a pretrial hearing addressed to these questions. Where, however, the statute is challenged as applied, and where constitutionally protected rights are

not implicated, see, e.g., Kolender v. Lawson, supra, 103 S. Ct. at 1859 n. 8, resolution of the issue more appropriately awaits decision after a trial on the merits. This is so because the vagueness doctrine, as developed by the Supreme Court, requires that the court evaluate a challenge such as this one in light of the particular facts of the case at hand, including the conduct of the defendants. See Hoffman Estates, supra, 455 U. S. at 495; United States v. Powell, 423 U.S. 87, 92 (1975); United States v. Mazurie, 419 U.S. 544, 550 (1975); Parker v. Levy, 417 U.S. 733, 756 (1974); United States v. National Dairy Products Corp., 372 U.S. 29 (1963). See also United States v. Moller-Butcher, 560 F. Supp. 550, 555 (D. Mass. 1983).

Indeed, courts considering vagueness challenges to the Act, or related or predecessor provisions, have consistently looked to the peculiar circumstances of the cases before them. See, e.g., United States v. Swarovski, supra, 592 F. 2d at 132 (vagueness challenge rejected where it came from "one who was fully cognizant of the wrongfulness of his acts"), citing Screws v. United States, 325 U.S. 91, 102 (1945); United States v. Brumage, 377 F. Supp. 144, 149 (E.D.N.Y. 1974) (vagueness challenge rejected where defendants within the class reasonably familiar with export licensing requirements). It is all the more appropriate that they do so in light of the fact that specific intent must be proved in order for defendants to be convicted of violating the Act,

see 22 U.S.C. section 2778(c); United States v. Beck, 615 F. 2d 441, 450-51 (7th Cir. 1980); United States v. Wieschenberg, 604 F. 2d 326, 331 (5th Cir. 1979); United States v. Davis, 583 F. 2d 190 (5th Cir. 1978), or conspiring to do so. See United States v. Feola, 420 U. S. 671, 686 (1975) (same intent requirement for conspiracy as for underlying substantive offense). Thus, if the Act is sufficiently vague so that it is unreasonable for persons in defendants' positions to realize that their actions were illegal, then defendants ought to be acquitted. See Screws, supra, 325 U.S. at 101-03; Moeller-Butcher supra, 560 F. Supp. at 555; Brumage, supra, 377 F. Supp. at 149. If, despite proof of such unreasonableness, they are not acquitted, the court will, upon renewal

of this motion, consider disissal of the case. Since, resolution of the vagueness question will therefore require extensive findings of fact, all of which would be repeated upon the trial of this matter, efficiency dictates that such resolution await the results of such trial. The court therefore reserves upon the motion to dismiss. See Fed. R. Crim. P. 12(e).

B. Delegation (Fn 4).

1. The delegation to the President

Defendants Zheng and Lin argue that the Act unlawfully delegates power which should have been exercised by Congress to the President. The delegation doctrine, dating from the earliest days of our Republic, see

Industrial Union Department v. American Petroleum Institute, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring) (citing authorities), was best explicated almost fifty years ago. The Supreme Court, in striking down section 9(c) of the National Industrial Recovery Act as an unconstitutional delegation to the President, said:

> The Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Art I, section 1. And the Congress is empowered "To make all laws which shall be necessary and proper for carrying into execution" its general powers. Art I, section 8, par. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adopted to complex conditions involving a host

> of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935). See also A.L.A.

Schecter Poultry Corp. v. United States, 295 U.S. 495, 529-30 (1953) (section 3 of the National Industrial Recovery Act works an unconstitutional delegation of power): Hampton & Co. v. United States, 276 U.S. 394 (1928) (delegation to set tariffs upheld). Although certain members of the Supreme Court have of late expressed an interest in reviving this doctrine, American Textile Manufacturers Institute v. Donovan, 452 U.S. 490, 543-48 (Rehnquist, J., dissenting, joined by Burger, C.J.); Industrial Union Department, supra and a majority of the Court has demonstrated a reborn solicitude for the separation of powers in general, see, e.g., Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764, 2780-84 (1983), the fact remains that the delegation doctrine

has lain essentially dormant since the period immediately following the New Deal. But see National Cable Television Association v. United States, 415 U.S. 336, 342 (1974) (construing Independent Offices Appropriation Act narrowly so as to avoid constitutional delegation problem). Among those statutes upheld as against delegation challenges during this period were the predecessor to the Act (Fn 5) here at issue. See, United States v. Gurrola Garcia, 547 F. 2d 1075, 1078-79 (9th Cir. 1976); United States v. Stone, 452 F. 2d 42, 46-47 (8th Cir. 1971); Samora v. United States, 406 F. 2d 1095, 1098 (5th Cir. 1969). In disposing of constitutional challenges such as these, the courts have relied on the President's traditional dominance in and

responsibility for the conduct of foreign affairs. As a result of the "exclusive power of the President as the sole organ of the federal government in the field of international relations," the Supreme Court has warned that one "should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as an unlawful delegation of legislative power." United States v. Curtiss-Wright Corp., 299 U.S. 304, 315-22 (1936). (Fn 6).

> (B)ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress - in giving the Executive authority over matters of foreign

> affairs-must of necessity paint with a brush broader than that it customarily wield in domestic areas.

Zemel v. Rusk, 381 U.S. 1, 17 (1965). See also Panama Refining Co., supra, 293 U.S. at 422. Hence what is left of the delegation doctrine ought not be strictly enforced in cases involving foreign relations.

Nor has it been in cases construing the predecesor to this Act, see cases cited, supra, or related statutes. United Stats v. Rosenberg, 150 F. 2d 788, 789-90 (2d Cir.), cert. denied, 326 U.S. 752 (1945); United States v. Moller-Butcher, supra, 560 F. Supp. at 553 (construing Export Administration Act, 50 U.S.C. App. section 2401 et seq.); United States v. Brumage, supra, 377 F. Supp. at 149-50 (same).

Although the court is hesitant in expounding broad principles of delegation to an executive who may well abuse his or her foreign policy prerogatives, it finds the delegation here at issue to be unproblematic. Title 22 U.S.C. section 2778(a)(1) provides

> In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United Stats Munitions List.

Defendants argue that this provision leaves the President without standards to apply in formulating the Munitions List. This argument is without merit. First, the denomination "defense article" and "defense service" is not significantly broader that the category "arms, ammunition and implements of war, including technical data relating thereto" which concededly rendered the predecessor to the Act a lawful delegation of authority. See Brief of Defendant Zheng at 15. Defendants' argument that "any item, including wearing apparel or food, could be regarded as a 'defense article'," Brief of Defendant Zheng at 15, applies as well to the term "implements of war." Furthermore, both the Act and its predecessor serve the same ends: "world peace and the security and foreign

policy of the United States." See also Curtiss-Wright, supra, 299 U.S. at 312. The earlier provision having been upheld, there is no logic in striking down the current one.

Second, the terms "defense articles" and "defense services" are, in and of themselves, not standardless. As the Supreme Court stated in Gorin v. United States, 312 U.S. 19 (1941) in holding that the term "information respecting the national defense" was definite enough to withstand a challenge to the Espionage Act of 1917 on due process grounds, national defense is "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." The court continued,

"the language employed appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process." 312 U.S. at 28. If "national defense" sufficiently apprised the public of what comprised spying during World War II, then the term "defense articles" is certainly not standardless when directed to the President of the United States in the 1980s.

Third, the President's power under the Act is significantly reined in by other provisions of the Act. Thus, as defendants themselves point out, the President must "periodically review the items" on the Munitions List and submit the results of such review to Congress before any item is removed from the list. 22 U.S.C. section 2778(f).

Moreover, the issuance of export licenss is contingent upon a determination that

> the export of an article will (not) contribute to the arms race, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control arrangements.

22 U.S.C. section 2778(a)(2). These qualifications of the President's power, absent from such cases as Panama Refining or Schecter Poultry, render the Act far from the standardless provision described by defendants.

Finally, the components of a munitions list, like tariff rates, Hampton & Co., supra, or listings of disabilities, see Heckler v. Campbell, 103 S. Ct. 1952, 1957 (1983), are precisely the type of complex,

technical, oft-changed determinations best left for an expert administrator. It would be extremely unwieldy for Congress itself to arrive at and update this type of list. Delegation of such responsibilities to the executive is therefore appropriate.

2. Subdelegation

The creation of the Munitions List has been entrusted to the Director of the ACDA, a presidential appointee subject to the approval of the Senate. 22 U.S.C. section 2562. Defendants argue that this subdelegation is unlawful and, by the terms of the statute quoted, supra, only the President himself may develop such list. This argument is meritless.

First, the defendants ignore the

obvious intent of the statute. It delegates power to the Executive Branch, and fully contemplates that such power will be exercised by others than the President. Thus, the licensing process is to occur "in coordination with the Director of the United States Arms Control and Disarmament Agency." 20 U.S.C. section 2778(a)(2). The statute recognizes the expertise that will be possessed by the Director who is to "have primary responsibility within the Government for arms control and disarmament matters," 22 U.S.C. section 2562, defined to include "the identification, verification, inspection, limitation, control, reduction, or elimination of armed forces and armaments of all kinds under international agreement including the necessary steps taken under such an

agreement to establish an effective system of international control, or to create and strengthen international organizations for the maintenance of peace." 22 U.S.C. section 2552. Part of any such system of international control must be the monitoring of arms exports. To that end, the Director of the ACDA is best suited and indeed, statutorily required, to decide what ought and ought not be the subject of such exports.

Moreover, subdelegation is a necessary and accepted practice. See 1 Davis, Administrative Law Treatise, (3d ed. 1972) at 216. It is hard to imagine that the President himself is required to put pen to paper to draft the Munitions List: for him, as well as Congress, more important

decision-making awaits. Congress has recognized this and adopted 3 U.S.C. section 301 allowing just such subdelegation of Presidential power to "the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate ... without approval, notification, or other action by the President ..." Where such delegation is both within the scope of congressional intent and governed by standards such as those discussed supra, it is wholly proper. Defendants' motions to dismiss on grounds of unconsitutional delegation are, therefore, denied.

II. CHALLENGES TO THE INDICTMENT

Defendants challenge the suf-

ficiency of the indictment and move both to dismiss it and for a bill of particulars. (Fn 7)

A. Motion to dismiss

Defendants move to dismiss the indictment for failure sufficiently to apprise them of the offense with which they are charged. Essentially, they argue that the indictment does not properly allege a violation of 22 U.S.C. section 2778(c) in that it fails to state which "defense articles" are here involved. Further, defendants content that the indictment must be dismissed for failure to allege an actual sale or arrangement to sell and/or that any such sale was for export.

It is, of course, constitutionally

required that an indictment be sufficiently specific to inform a defendat of the charges against which he or she must defend, and enable him or her to plead an acquittal or conviction in bar of future prosecutions for the same offense. See, e.g., Hamling v. United States, 418 U.S. 87, 117 (1974); Russell v. United States, 369 U.S. 749, 763-64 (1962). Federal Rule of Criminal Procedure 7(c)(1) codifies this standard, requiring that an indictment be "a plain, concise and definite written statement of the essential facts constituting the offense charged." It is, however, axiomatic that, where as here, the offense charged is a conspiracy, the indictment need not allege "with technical precision all of the elements essential

to the commission of the offense which is the object of the conspiracy." Wong Tai v. United States, 273 U.S. 77, 81 (1927). Rather, a conspiracy count need only charge: (1) an agreement; (2) an unlawful purpose or object; and (3) at least one overt act in furtherance thereof. See, e.g., United States v. Falcone, 311 U.S. 207, 210 (1940); United States v. Wieschenberg, supra, 604 F. 2d at 331 (conspiracy to violate predecessor of the Act). Hence, courts have consistently held that a conspiracy count need not be as precise as a count alleging a violation of a substantive offense. See, e.g., United States v. Ramos, 666 F. 2d 469, 475 (5th Cir. 1982); United States v. Clark, 649 F. 2d 534, 539 (7th Cir. 1981; United States v. Pheaster, 544 F. 2d 353, 360 (9th Cir.

1976), cert. denied, 429 U.S. 1099 (1977), quoting Wong Tai, supra, 273 U.S. at 81. See also United States v. Jannotti, 673 F. 2d 575, 591 (3d Cir. 1982) (affirming district court decision dismissing substantive counts for failure to plead one element of Hobbs Act offense, while allowing conspiracy count to stand).

In light of these principles, the indictment must stand. First, a failure to allege that defendant consummated an export transaction is irrelevant where it is only the agreement to do so, here alleged, that needs be charged. See generally United States v. Feola, supra, 420 U.S. at 693 (conspiracy law serves ends different from those served by substantive offenses). Second,

defendants' argument that the government must identify the precise defense articles here at issue flies in the face of the above principle: a conspiracy to export unlicensed items--including an agreement to do an unlawful act, and several overt acts in furtherance thereof -- is clearly set forth. Moreover, the items at issue are named in paragraph 5 of the indictment, giving some notice to defendants of the allegations against them. Should the government proceed to prosecute defendants for the agreement illegally to export items not named in the indictment, then defendants will have cause to complain. Absent such prejudice, however, the indictment must survive. See Russell v. United States, supra, 369 U.S. at 763. Finally, it should be noted that this

indictment is far more detailed than others charging a violation of the Act or its predecessors which have been allowed to stand. See e.g., Etheridge v. United States, 380 F. 2d 804, 805, 809 (5th Cir. 1977) (count one in indictment under 22 U.S.C. section 1934, alleging conspiracy to export "arms, ammunition and implements of war" held sufficient). The cases cited by defendants are inapposite. The motion to dismiss is therefore denied.

B. Bill of particulars

Defendants Tsai and Yeung have moved pursuant to Federal Rule of Criminal Procedure 7(f) for a Bill of Particulars. Specifically, they request an itemization of the defense articles alleged to be involved, the procedural history of their being made

part of the Munitions List, the other locations, co-conspirators, dates and overt acts involved in the conspiracy, and, for Tsai, the date upon which he entered the conspiracy and the overt acts with which he is charged. The government argues that these requests are either improper or unreasonable in light of the clarity of the indictment and the discovery already provided. With one exception, the court agrees.

> The purpose of the bill of particulars is to inform the defendant of the nature of the charges brought against him to adequately prepare his defense, to avoid surprise during trial and to protect him against a second prosecution for an inadequately described offense. A bill of particulars should fulfill this function "when the indictment itself is too vague and indefinite for such purposes."

United States v. Addonizio, 451 F. 2d

49, 63-64 (3d Cir. 1971), cert. denied, 405 U. S. 936 (1972) (citations omitted). The grant or denial of such a motion is committed to the sound discretion of the district court. Id. at 64; Wong Tai, supra, 273 U.S. at 82. As discussed, supra, the indictment is not here vague or indefinite; hence, a bill of particulars is not necessary. Nor are most of defendants' requests proper: the information requested by defendant Tsai regarding the President's decisions with respect to the Munitions List are part of the public record and thus available to defendants, as well as to the government, through their own research. Further details requested concerning the dates and places of the conspiracy would allow defendants wholesale discovery of the government's

evidence, contrary to the purpose of Rule 7 (f). See United States v. Armocida, 515 F. 2d 49, 54 (3d Cir., cert. denied, 423 U.. 858 (1975); Addonizio, supra, 451 F. 2d at 64. Other overt acts need not be disclosed. United States v. Perez, 489 F. 2d 51, 70 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974) citing cases). Nor is defendant Tsai entitled to know the particulars of the allegations regarding his personal involvement. See, e.g. United States v. Ostrer, 481 F. Supp. 407, 417 (S.D.N.Y. 1979). Furthermore, the government here represents that it is currently unaware of the identity of any unindicted co-conspirators and that "(i)n the event that other coconspirators become know, their identity will promptly be supplied to the defendants."

Government's Brief at 32 n. 10.

However, although the discovery already provided, in the form of transcripts of tapes or videotaped conversations, seems to provide notice as to what defense articles are here at issue, the court here orders that a bill of particulars be provided by the government specifying precisely which articles will provide the basis for this prosecution. While the absence of such exact information does not render the indictment so vague as to require dismissal, the court finds that greater certaintly will enhance the quality of the notice given defendants and avoid the type of surprise at trial which would be unacceptable to the court and to defendants. With this exception, however, defendants' motions for bills

of particulars are denied. The court notes that the government has fully and fairly complied with its discovery obligations to this point; it expects that defendants will do the same.

III. CHALLENGES TO THE GOVERNMENT'S CONDUCT

A. Due process (Fn 8)

Defendants move to dismiss the indictment on the ground that the behavior of the government was so outrageous as to violate defendant's right to due process. Separate and apart from any entrapment defense, see United States v. Russell, 411 U.S. 423, 431-32 (1973), this due process argument is one that has been accepted in the Third Circuit, see United States v. Twigg, 588 F.2d 373, 377-80 (3d

Cir. 1978), notwithstanding its limited application by the Supreme Court. Hampton v. United States, 425 U.S. 484 (1976). The government argues, correctly, that recent Third Circuit jurisprudence has emphasized that dismissal on the ground of a violation of the due process clause is a power to be exercised but sparingly. See United States v. Beverly, 723 F.2d 11, 12-13 (3d Cir. 1983); United States v. Jannotti, supra, 673 F.2d at 606-10; United States v. Bocra, 623 F.2d 281, 389-90 (3d Cir. 1980). Nonetheless, the doctrine retains some vitality. The due process clause is available to "curb the most intolerable government conduct," Beverly, supra, 723 F.2d at 12, where it reaches "that 'demonstrable level of outrageousness' necessary to compel acquittal so as to

protect the Constitution." Id. at 13, quoting Hampton, supra, 425 U.S. at 495 n.7 (Powell, J., concurring).

The parties, of course, differ as to whether that standard has here been met. Defendants paint a picture of the government, through Customs Service Agent Moyes, initiating the contacts with defendnts, promising to supply the defense articles at issue, pressuring the defendants continuously to engage in unlawful behavior to which they were not inclined and attempting to expedite the deal and bring it to a rapid conclusion. The government responds that the idea of illegally exporting defense articles, by shipping the merchandise through a third country, here Hong Kong, was the defendants' alone. Admitting that Agent Moyes

played a part, the government nonetheless asserts that it was defendants who ultimately opted for an illegal modus operandi.

The parties concede that a full hearing on this issue is required. Defendant Zheng's Brief at 28; Government's Brief at 39. The court agrees: the allegations of government misconduct are serious ones, not susceptible of decision based upon transcripts alone. Other evidence must be received and credibility determinations made. The only question that remains is of the timing of such hearing. The court has discretion either to hold such a hearing prior to the time of trial or, if good cause exists, defer the matter "for determination at the trial of the

general issue or until after verdict." Fed. R. Crim. P.12(e). Wisdom counsels the latter course here, as it has in other, similar situations. See. e.g., United States v. Williams, 644 F.2d 950, 952-53 (2d Cir. 1981); United States v. Marcello, 508 F. Supp. 586, 593 (E.D. La. 1981) (citing cases). The evidence that will be presented with respect to the due process issue will, for the most part, be admissible at trial on the issue of intent. Additional evidence, for example, of intragovernmental communications that might bear on the government's conduct but not the defendants' state of mind, can be adduced after trial, if necessary. This disposition will render it unnecessary to re-try many of the same facts--indeed, most of the case--in the

event that the due process claim is presented and the motion denied under the rigorous standards which now prevail. See United States v. Barletta, 500 F. Supp. 739 (D. Mass. 1980). Judicial time and litigants' money will thus be saved.

The court recognizes that if there has been a violation of defendants' due process rights, there is a basic unfairness in requiring the defendants to subject themselves to a full scale trial prior to a determination of their claim. They quite properly argue that if the government has been guilty of outrageous conduct, they should not be put through the trauma, anxiety and expense of a trial. However, because of the near identity of the scope of the hearing and the trial itself, the

court concludes that the interests of justice require a single combined trial and that such procedure adequately protects the rights of the defendants.

For these reasons, the court reserves on defendants' motion to dismiss on due process grounds until after trial and denies their motion for a pretrial hearing.

B. Motions to suppress

Three defendants have moved to suppress evidence. Defendant Tsai moves to suppress evidence seized from his home on February 11, 1983. Though without a warrant, the search was by written consent. Tsai now argues that such consent, given while in custody, was not voluntary. A hearing is ordered to address the limited issue of

voluntariness, which hearing is consented to by the government and shall occur at 10:00 AM on May 30, 1984.

Defendant Tsai also moves to quash a trial subpoena issued to the Chase Manhattan Bank, where Mr. Tsai was employed, requesting documents concerning Mr. Tsai. The case law is clear: Mr. Tsai lacks standing to challenge a subpoena duces tecum for any bank records regarding him. United States v. Miller, 425 U.S. 435, 440-46 (1976). See also United States v. Payner, 447 U.S. 727, 732 and n. 4 (1980). However, certain of his personal documents in the possession of the bank were also requested by the subpoena, and it is these which defendant claims are here at issue.

With respect to these items, defendant has standing to challenge this subpoena, as he would a search of his place of employment. Mancusi v. DeForte, 392 U.S. 364, 367-69 (1968), cited in Rakas v. Illinois, 439 U.S. 128, 143 (1978). However, it appears that Chase Manhattan has already complied with the subpoena. Hence defendant Tsai has failed to make his motion to quash sufficiently promptly (Fn 9) to prevail on his complaint that the scope of the subpoena exceeds the bounds of pretrial production authorized by Federal Rule of Criminal Procedure 17(c). See generally United States v. Nixon, 418 U.S. 683, 699-700 (1974). Nor is it clear that the government sought pretrial discovery. Rather, acting in a fashion considered less intrusive than a

third-party search would have been, see Zurcher v. Stanford Daily, 436 U.S. 547, 560-63 (1978), the prosecutor made such subpoena returnable on the scheduled trial date. Early compliance was not the government's fault, nor the result of any apparent impropriety, and defendant does not object to the subpoena as a trial subpoena. Finally, defendant does not move to suppress the materials as resulting from an illegal search and seizure: were he to do so, however, he would have to show why such search was not a private search beyond the strictures of the fourth amendment, Burdeau v. McDowell, 265 U.S. 465 (1921); United States v. Valen, 479 F. 2d 467 (3d Cir. 1973), cert. denied, 419 U.S. 901 (1974), and that bank officials could not have consented to a search of Mr. Tsai's belongings

located on their premises. See generally United States v. Matlock, 415 U.S. 164, 171 (1974). Defendant Tsai's motion to suppress is denied.

Defendant Yeung has moved to suppress items seized from his suitcase, which was being stored at the home of defendant Tsai. The government has, however, agreed not to use such evidence at trial, rendering this motion moot.

Finally, defendant Zheng has moved to suppress a post arrest statement and the search and seizure of certain briefcases, bags and other luggage. No supporting papers were submitted. The government has consented not to use such post arrest statement in its case-in-chief, rendering the former motion moot. (Fn 10). As to the

latter, despite the failure of defendant Zheng to provide any argument in support of his motion, the court hereby orders a hearing on such motion, also to take place at 10:00 AM on May 30, 1984.

IV. REDACTION

Defendant Zheng has moved to redact any reference to him in the post-arrest statements of his co-defendants. The government has agreed to do so and offers a redacted version of the only such statement it plans to use at trial, that of defendant Yeung. Now, however, Yeung objects to such redaction, claiming that it unfairly prejudices him, in violation of his right to have the document presented in his entirety. See Letter of April 11, 1984, citing

Bruton v. United States, 391 U.S. 123, 143 (1968) (White, J., dissenting). He argues that he must be allowed to present an unredacted version of his statement or have his trial severed from that of Mr. Zheng. At oral argument, however, the government agreed to attempt to arrive at a more limited form of redaction which will prove satisfactory to Mr. Yeung and yet protect the sixth amendment rights of defendant Zheng. Pending the submission of such proposed redaction and an opportunity for the pertinent parties to be heard on it, the court reserves on this motion.

The government is directed to submit an order in conformity with this opinion.

H. Lee Sarokin, U.S.D.J.

Date: May 23, 1984
Original to Clerk, U.S. District Court
Copy to: Harvey Weissbard, Esq.
Robert E. Margulies, Esq.
John D. Arseneault, Esq.
Robert Fettweis, Esq.
Gerald D. Miller, Esq.
Susan V. Tipograph, Esq.

FOOTNOTES

(Fn 1) This motion was made and briefed by defendant Zheng and joined in by the other defendants.

(Fn 2) The court notes that such article, of course, has limited credibility, especially because it begins by stating that the State Department has delayed the instant case, which is simply not true.

(Fn 3) Defendants argue that the fact that the list denominates generic categories, rather than particular items, violates the statute, which requires the President "to designate those items which shall be considered as defense articles ..." 22 U.S.C. section 2778(a). This may be true. However, unless such generic categories render the statute vague, such violation does not comprise a ground for dismissal of the indictment. Nor would defendants have standing to raise such violation as a basis for dismissal independent of their vagueness challenge.

(Fn 4) This motion was made and briefed by defendants Zheng and Lin, and joined in by the remaining defendants.

(Fn 5) 22 U.S.C. section 1934 (repealed).

(Fn 6) Curtiss-Wright has been seen as an effort to "get around Panama and Schecter" in order to conclude that "Congress could in the foreign affairs field make a delegation to the executive which in the domestic field would be unconstitutional." United States v. Butenko, 494 F. 2d 593, 630 (3d Cir. 1974) (Gibbons, J. dissenting in part). Judge Gibbons joins other commentators in criticizing this holding, see Lofgren, United States v. Curtiss-Wright Corporation: An Historical Reassessment, 83 Yale L.J. 1 (1973), and this court might not apply this doctrine were it pushed to its outer limits. This case does not, however, do so.

(Fn 7) The motion to dismiss was made and briefed by defendant Lin and joined in by the other defendants. Bills of particulars were requested by defendants Yeung and Tsai.

(Fn 8) Defendant Zheng made and briefed the motion regarding violation of the due process clause. All other defendants have, however, joined in such motion.

(Fn 9) There is no indication that defendant did not receive timely notice of such subpoena.

(Fn 10) Regardless of the outcome of the hearing requested by defendant Zheng, such statement would be admissible for impeachment purposes. Harris v. New York, 401 U.S. 222 (1971).

APPENDIX IV

ORIGINAL FILED
OCTOBER 4, 1984
ALLYN Z. LITE
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal Action No. 84-64
Plaintiff,	:	OPINION
v.	:	Criminal No. 84-64
DA-CHUAN ZHENG, KUANG-SHIN LIN, DAVID TSAI, KWONG ALLEN YEUNG, and JING-LI ZHANG,	:	
Defendants.	:	

SAROKIN, District Judge

This matter is before the court on the government's motion for reconsideration of the court's July 26, 1984 Opinion and Order ("Opinion") dismissing an indictment charging defendants with one count of conspiracy to violate the Arms Export Control Act,

22 U.S.C., Section 2778 ("the Act")(Fn 1), by arranging for the unlicensed export of radar jamming devices, known as wave tube amplifiers, to the People's Republic of China. The court's ruling was based upon the Act's requirement that those "defense articles and defense services" subject to import and export controls be designated as "items" on the United States Munitions List, 22 C.F.R. Section 121.01 et seq. The court held that the section of the Munitions List which the government claimed encompassed wave tube amplifiers failed to designate "items" and, instead, named the "category" "active and passive countermeasures and counter-countermeasures." 22 C.F.R. Section 121.01, Category XI(a)(1). The court thus found such category to be beyond the scope of the Act and as such, a

nullity not capable of supporting an indictment.

The court's analysis proceeded in three stages. First, the court held that "there is no question but that the term 'countermeasure' does not constitute an 'item.'" Opinion at 4. Even read in context, Opinion at 4-5 and n.3 (Fn 2), "countermeasures" did not fall within the dictionary definition of the term "item." Thus, the court found that common sense dictated that

> "Countermeasures" is simply too broad a description to be considered an "item;" to require greater specificity is not to mandate undue particularization, but to require the Executive merely to promulgate a list of "items" in conformity with the Act.

Opinion at 6. That the government specifically listed wave tube

amplifiers elsewhere in the Code of Federal Regulations, see, e.g., 14 C.F.R. Section 171.323, and created a Munitions List sufficiently specific in many other respects demonstrated to the court that wave tube amplifiers could have been properly listed without undermining the necessary flexibility of the Munitions List. Opinion at 7-8.

Second, the court held that the language of the Act mandated the listing of "items" and that this language, as well as the legislative history underlying it, made clear that such mandate was consistent with the purposes of the Act. Thus, in contrast to the Export Administration Act, the Arms Export Control Act required the specification of "items" in order to effectuate the more rigorous oversight of the Executive mandated by Congress.

Opinion at 9-10. Together, these two Acts were meant to impose import and export control on only those articles appropriately regulated, and to make clear to exporters and importers precisely what those articles were. The use of the term "items" in the Arms Export Control Act accomplishes this purpose and was a choice made by Congress in passing such Act, and repealing its predecessor. Opinion at 11-13.

Finally, the court held that, because the Executive had failed to adhere to the statutory mandate of the Act by denominating "categories" rather than "items" on the Munitions List, such action was deemed a nullity and could not support a prosecution. For this reason, the indictment was to be dismissed.

In its motion for reconsideration, the government does not address the first or third prongs of the court's analysis (Fn 3). Rather, for the first time, it confronts the legislative history of the Act, arguing that the court's analysis is erroneous in three respects. Primarily, the government directs itself to a single footnote in the court's Opinion, arguing that the court erred in concluding that Congress meant to require greater specificity when it passed the Act, and thus changed the statutory basis for the Munition's List. See Government's Brief at 3-6, citing Opinion at 13 n.6. Second, the government contends that it was inappropriate for the court "to engraft onto the Arms Export Control Act the legislative history for the Export Administration Act," in part because the two Acts "were not even

enacted by the same Congress." Government's Brief at 6-7. And third, the government argues that Congress achieved sufficient oversight of the Munitions List by requiring that the Executive comply with various reporting requirements set forth in the Act; hence, "a more particularized Munitions List would add nothing to the legislative capacity to oversee the arms exportation process. For purposes of congressional oversight, then, the terminology of the Munitions List is irrelevant." Government's Brief at 8.

The court finds these contentions to be without merit and therefore denies the government's motion for reconsideration. The government has not persuaded the court that it erred in holding that Congress meant "items" when it repeatedly said "items" in the

Act. See 22 U.S.C. Sections 2776(a)(4), 2778(a)(1), 2778(f). Of course, "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Products Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Nonetheless, the government argues that when Congress stated, for example, that "(t)he President is authorized to designate those items" which would constitute the United States Munitions List, it implicitly allowed the President to designate categories as well. This argument disregards the language of the Act, language which, the court must assume, was meant to be given full effect, see, e.g., Reiter v. Sonotone Corp., 442

U.S. 330, 339 (1979), citing United States v. Menasche, 348 U.S. 528, 538-39 (1955), and should be strictly construed, particularly where criminal sanctions are at issue. See, e.g., Adamo Wrecking Co. v. United States, 434 U.S. 275, 285 (1978), citing United States v. Bass, 404 U.S. 336, 348 (1971).

Moreover, the court beieves that the legislative history relied upon supports its position. The government does not dispute that, in enacting the Act in 1976, Congress added the word "items" to the statute, thereby distinguishing such statute from its predecessor. 22 U.S.C. Section 1934. See Opinion at 13 n.6. ("In any event, the change in the statute reveals an intentional movement to the word 'item' in 1976.") However, it attacks the

court's conclusion that such change was meaningful, arguing that the language and history of the Act make clear that Congress did not intend, by its passage, to require particularization of the Munitions List. Thus, the government argues that Congress explicitly continued the existing Munitions List in full force and effect. Indeed, Section 212(b)(2) of the Act, Pub. L.94-329 (Fn 4),

> All determinations, authorizations, regulations, orders, contracts, agreements and other actions issued, undertaken, or entered into under (22 U.S.C. Section 1934, the predecessor of the Act) shall continue in full force and effect until modified, revoked, or superseded by appropriate authority.

It is true, as the government argues, that this language alone does not state that the new Munitions List was necessarily to be more particularized

than that which preceded it. However, Section 212(b)(2) clearly anticipates that the Munitions List, and/or other regulations issued pursuant to the Mutual Security Act of 1954, 22 U.S.C. Section 1934, would change as a result of the passage of the Arms Export Control Act. Such changes might occur by virtue of changes in the language of the latter Act, as the Executive attempted properly to bring such regulations into compliance with such Act. Congress acted so as to insure continuity in the interim. It could not, however, have intended that existing regulations not conforming to its new enactment be insulated from review as a result of this clause. Indeed, such review is explicitly authorized, and in the exercise of its "appropriate authority," the court has performed such review here. The

government's argument that the Munitions List, with its many imperfections, see Government's Brief at 4-5, was to be continued permanently "in full force and effect," notwithstanding express statutory language requiring it to change thus misconceives the purpose and substance of the savings clause which it quotes. Congress did not approve of the existing Munitions List; it simply did not requre that it be scuttled pending appropriate legislative, administrative or judicial action.

The government is also correct that the legislative history which it cites does not require a more particuarized list. Nor, however, does it stand for the opposite proposition that, as the government contends, "Congress intended no substantive

change in the manner in which the Muntions List up to that time had been compiled." Government's Brief at 6. Referring to the Act's substitution of the term "defense articles and defense services" for the term "arms, ammunitions, and implements of war" in 22 U.S.C. Section 1934, the Report of the Senate Committee on Foreign Relations stated,

> This change is merely intended to conform (22 U.S.C. Section 2778) to the style of the other sections of the Act. It is not intended to alter the scope of items subject to export control, or the extent of such control, under the regulations authorized by this bill.

S. Rep. No. 94-876, 94th Cong., 2d Sess. (1976) at 42, cited in Government's Brief at 5-6. This snippet of legislative history does not assist the court in defining the

term "item," or in assessing its importance. Rather, it makes clear that in changing the language of the Act, no change in the types of items which were to comprise the Munitions List was intended. Indeed, this quotation does not mention the conspicuous addition of the word "items" to the Act, except to utilize such word precisely as does the Act (Fn 5).

The court remains convinced that such addition was not coincidental; its decision strove, therefore, to give the meaning to the term "item" that was intended by Congress. In gleaning this meaning, the court relied primarily upon the ordinary definition of the term. However, the court recognized that this "need not end the inquiry," and went beyond such

"plain meaning" to ascertain the purposes behind Congess' actions. See, e.g., Watt v. Alaska, 451 U.S. 259, 265-66 (1981). In so doing, it compared the Arms Export Control Act with the Export Administration Act, a comparison which the government labels inappropriate. See Government's Brief at 6 (Fn 6).

Such comparison was not one that was fabricated by the court. In fact, the Export Administration Act amended the Arms Export Control Act to bring the two into line. As the court noted, the Export Administration Act explicitly stated

> The authority granted to the President in this Act shall be exercised in such a manner as to achieve effective coordination with the authority exercised under section 38 of the Arms Export Control Act (22 U.S.C. 2778).

50 U.S.C. App. Section 2416(b), cited in Opinion at 11. The Arms Export Control Act was amended accordingly. 22 U.S.C. Section 2778(e). And, when the Act was again amended in 1981, further coordination with the Export Administration Act was explicitly effected. See 22 U.S.C. Section 2778(f) (reports to Congress regarding items no longer warranting controls "shall describe the nature of any controls to be imposed on that item under the Export Administration Act of 1979..."). In light of this express language of coordination, it matters little that, as the government argues, "(t)he two statues, after all, were not even enacted by the same Congress." Government's Brief at 6-7. See, e.g., Oscar Meyer & Co. v. Evans, 441 U.S. 750, 756 (1979) (interpreting Title VII of the Civil

Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 in pari materia), citing Northcross v. Memphis Board of Education, 412 U.S. 427, 428 (1973). See generally 2A Sands, supra, Section 51.02 at 290 ("...it is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they should all be construed together.") See also Commonwealth of Pennsylvania v. Department of Health and Human Services, 723 F.2d 1114, 1119 (3d Cir. 1983) ("statutory provisions enacted at different times should be read as

harmoniously as possible, so that each is given effect and the provisions do not conflict") (citing cases).

The court utilized a comparison between the Export Administration Act and the Arms Export Control Act to clarify the purposes of the latter. Thus, the court noted that the Acts were dissimilar in that the Arms Export Control Act involved more rigorous oversight of executive actions thereunder by Congress. It found that the inclusion of the term "items" in the Arms Export Control Act but not in the Export Administration Act was consistent with this distinction and concluded that, by including the term "items," Congress intended to enhance the effectiveness of such oversight. Viewed this way, failure to name "items" is a material

breach of the Act. See Opinion at 10 (Fn 7).

Such comparison also made clear that the term "items" was meant to increase the quality of the notice provided by the Act, and thereby to "remove unnecessary barriers to exporting goods which might arise from the chilling effect that necessarily attends less clear regulation." Opinion at 13-14. Such a reading was consistent with the purposes of the Export Administration Act, which purposes were incorporated into the Arms Export Control Act by the amendment thereto, or which, to the extent they conflicted with the latter, were most recent and thus, prevailed. See Watt v. Alaska, supra, 451 U.S. at 266-67, citing 2A Sands, supra, Section 51.02. The

court thus continues to believe that Congress intended, and continues to intend, to maximize the notice given to potential arms dealers, and that the term "items" was one means of accomplishing this goal.

The government's motion for reconsideration must therefore be denied, for it fails to persuade the court that the court erred in holding that Congress meant what it said and said what it meant. The language of the Act cannot be disputed. Extrinsic aids to its interpretation make clear that Congress did not act inadvertently in adding the term "items," but meant to change the law with particular purposes in mind. In ignoring the language of the Act, the Executive has undermined these purposes and exceeded his authority.

His actions do not, therefore, acquire the force of law; much less may they give rise to criminal liability.

The government's motion for reconsideration is denied. An appropriate order will issue.

H. LEE SAROKIN,
U.S.D.J.

Date: October 4, 1984

Original to Clerk, U.S. District Court

Copy to: Harvey Weissbard, Esq.
Robert E. Margulies, Esq.
John D. Arseneault, Esq.
Robert Fettweis, Esq.
Gerald D. Miller, Esq.
Susan V. Tipograph, Esq.

FOOTNOTES

Fn 1. In its Opinion, the court often referred to the Act as the Arms Control Export Act. The proper designation is the Arms Export Control Act.

Fn 2. The government appears to argue that the Court did not consider the term "active and passive countermeasures and counter-countermeasures" in context. See Government's Brief at 2, n.1. In fact, the court's Opinion specifically states that such term comprises a category even where "limited to... 'Military and Space Electronics' and even read in the context of the paragraph in which it appears." Opinion at 4. That part of the paragraph not quoted by the court adds little to the context, so described.

Fn 3. The government has previously argued that countermeasures are sufficiently "items" within the meaning of the Act and that defendants lack standing to raise the instant issue because of their alleged knowledge of the illegality of their actions. Defendant Zheng argues, with some force and justification, that the government's failure to raise the issues brought before the court on this application renders this application procedurally inappropriate. The Court will nonetheless address the government's concerns, in the interests of finally disposing of this matter on its legal merits.

Fn 4. This provision apparently has not been made a part of the United States Code. It can be found in the annotations to 22 U.S.C. Section 1934.

Fn 5. Defendant Zheng argues that the "itemization" of the Munitions List was contemplated even by the predecessor of the Act. See Brief of Defendant Zheng at 8-9. Indeed, the legislative history indicates that one purpose of the Mutual Security Act of 1954 was "to relieve commercial enterprises of the burden of unnecessary detail and redtape required under existing legislation." See S. Rep. No. 1799, 83d Cong., 2d Sess., quoted in 1954 U.S. Code Cong. & Adm. News 3175, 3268. This goal is consistent with greater particularization of the Munitions List. See Opinion at 11-13. The court believes that in adding the word "items," Congress sought to achieve this goal. See United States v. Tapert, 625 F.2d 111, 121 (6th Cir.), cert. denied, 449 U.S. 952 (1980) (amendment "is a common and customary legislative procedure... strengthening and clarifying existing laws"); 1A Sands, Sutherland Statutory Construction Section 22.30, at 178 (1972) ("...in interpreting an amendatory act there is a presumption of change in legal rights.") See also May Department Stores Co. v. Smith, 572 F.2d 1275, 1278 (8th Cir.), cet. denied, 439 U.S. 837 (1978) (amendment, though not controlling, is entitled to substantial weight in contruction of statute) citing Glidden Co. v. Zdanok, 370 U.S. 530, 541 (1962); 1A Sands, supra, Section 22.31 at 184.

Fn 6. Defendant Zheng is correct that this very comparison is one previously urged upon the court by the government. See Brief of Defendant Zheng at 13-14, quoting Government's Brief in Opposition to Defendants' Pretrial Motion at 22.

Fn 7. The government's argument that the Act achieves all the congressional oversight it needs by virtue of the reporting requirements of 22 U.S.C. Section 2776 is unconvincing. Such oversight is mandated by Section 2276; it is made effective by, for example, the requirement that the Munitions List be composed of "items." Hence, the "items" requirement supplements the reporting provisions, and is entirely consistent with it. The effort by the government to characterize the two requirements as somehow exclusive of one another finds no support in the legislative history, in principles of statutory construction, or in logic.

APPENDIX V

CRIMINAL COMPLAINT

UNITED STATES DISTRICT COURT -
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA
V.
DA-CHUAN ZHENG,
KUANG-SHIN LIN,
DAVID TSAI
ALLEN YEUNG, and
JING-LI ZHANG

Complaint for Violation of Title 18
United States Code Sec. 371 and 2

Honorable G. Donald Haneke
U.S. Magistrate
Newark, New Jersey

Date of Offense 2/11/84 | Place of offense Shrewsbury, NJ

COMPLAINANT'S STATEMENT OF FACTS CONSTITUTING THE OFFENSE OR VIOLATION:

On or about February 11, 1984, in the town of Shrewsbury, in the District of New Jersey, the defendants DA-CHUAN ZHENG, KUANG-SHIN LIN, DAVID TSAI, ALLEN YEUNG, and JING-LI ZHANG, conspired with each other to violate the Arms Export Control Act, Title 22, United States Code, Section 2778(c), to wit, these defendants conspired to export to the Peoples Republic of China Watkins-Johnson 3108 TWTA units, which

items are presently included on the Munitions Control List as defined in Title 22. United States Code, Section 2778(a). In furtherance of the conspir- acy, the defendants committed the following overt act:

On February 11, 1984, the defendants

DA-CHUAN ZHENG,
KUANG-SHIN LIN,
DAVID TSAI,
ALLEN YEUNG, and
JING-LI ZHANG

met with Special Agent Richard Kennan and set the terms and conditions of purchase rates of high technology equipment with military application. In violation of Title 18, United States Code, Sections 371 and 2. (SEE ATTACHED)

FRANK VENTURA
Special Agent,
U.S. Customs
Date: 2/13/84

I, Frank Ventura, am a Special Agent of the United States Customs Service, Department of Treasury. I have probable cause to believe defendants

DA-CHUAN ZHENG,
KUANG-SHIN LIN,
DAVID TSAI,
ALLEN YEUNG, and
JING-LI ZHANG

on or about February 11, 1984, conspired to violate the Arms Export Control Act, Title 22, United States Code, Section 2778, in violation of Title 18, United States Code, Sections 371 and 2. This belief is based on the following facts of which I have personal knowledge.

A. The Newark Division of the United States Customs Service is presently operating an undercover operation in New Jersey. During the course of this investigation, a Special Agent of the United States Customs Service, acting in an undercover capacity, met with KUANG SHIN LIN on three separate occasions.

B. On February 7, 1984, Special Agent Richard Kennan, in an undercover capacity, met with LIN in an office in Shrewsbury, New Jersey. This meeting was videotaped. I have reviewed a videotape of that meeting in the presence of Special Agent Kennan. Kennan has stated to me that this videotape truly and accurately reflects the meeting which took place. During this initial meeting, LIN expressed to Kennan that he was interested in

purchasing, among other things, a Watkins-Johnson 3108-1 TWTA from Kennan on behalf of his client. He stated that his client, a businessman from Hong Kong, was interested in diverting this equipment to the People's Republic of China. Kennan had earlier represented himself as being capable of exporting high technology equipment.

C. I have spoken to the United States Office of Munitions Control. This agency is charged with maintaining descriptions of items which constitute the United States Munitions List described in Title 22, United States Code, Section 2278(a)(1). Representatives from the Office of Munitions Control have stated:

> (1) The Watkins-Johnson 3108-1 TWTA, is presently on the United States Munitions List. As such, its exportation is controlled by Title 22, United States Code, Section 2778, et seq.
>
> (2) This equipment is a transverse wave tube amplifier and has military application as part of radar and guidance systems.
>
> (3) The exportation of such equipment without a license from the Office of Munitions Control is a violation of Title 22, United States Code, Section 2778, et seq.

D. On February 10, 1984, LIN again met with the undercover agent in Shrewsbury, New Jersey. This meeting was also videotaped and I have reviewed the videotape with Special Agent Kennan.

Kennan has stated to me that the videotape accurately and truly represents the events of this meeting.

E. At the February 10, 1984 meeting, LIN was accompanied by defendants

DA-CHUAN ZHENG,
JING-LI ZHANG, and
ALLEN ZHENG

DA-CHUAN ZHENG represented himself to be the client LIN had discussed in the February 7, 1984 meeting. LIN and DA-CHUAN ZHENG, in the presence of JING-LI ZHANG and ALLEN ZHENG stated that DA-CHUAN ZHENG was presently in the United States for the purpose of purchasing high technology equipment on behalf of his associates in the People's Republic of China.

F. Price and terms of a sale of the above-described equipment was discussed by the three men. Kennan made known to them that this equipment could not be sold without an export license and further that he could not obtain the necessary licensing to export such goods. Nevertheless, both CHANG and LIN stated that they wished to negotiate a sale and that they would pay for the "risks" incurred by Kennan.

G. During the meeting, CHANG showed Kennan a list of high technology equipment that he was presently shopping for in the United States on behalf of his clients in the People's Republic of China. Among the items on this list are items which also have military systems application. A copy of the list is attached hereto as Exhibit 1.

H. On February 11, 1984, another meeting took place in Shrewsbury, New Jersey. The events of this meeting were related to me by Special Agent Kennan. During this meeting, the defendants

DA-CHUAN ZHENG,
KUANG-SHIN LIN,
DAVID TSAI,
ALLEN YEUNG, and
JING-LI ZHANG

established terms and conditions for the sale of the Watkins Johnson 3108-1 TWTA.

CALMA Model 84 [illegible]
Computer Assist[illegible]

D.E. MANIN 3000 or [illegible]
Figure Generator 圖形產生器

D.A. MANIN 3696 or GCA [illegible]
光罩資料帶

GCA 8400
Very Larger IC Design System (超大規模積體電路設計系統)

CARIAN 400 KEV and 200 KEV
離子注入機

PDP 11-34M (Military)
Mini Calculator (小型計算機)

VARIAN Model VMS-1113
Coaxal Magnetron (同軸磁控管)

TELEDUNE Model M5150
Wide-band Low-noise Travelling Wave Tube (寬帶低雜訊行波管)

TELEDUNE Model M5151A
Wide-band Low-noise Travelling Wave Tube (寬帶低雜訊行波管)

HUGHES Model 639H
Double Mode Travelling Wave Tube (雙模行波管)

RAYTHON Model QKW 1949
Mini Sized (Small Sized) Travelling Wave Tube (小型行波管)

RAYTHON Model QKW 1704
High-Power Travelling Wave Tube (大功率行波管)

WATKINS - T Model WJ 3108-1
Millimeter Wave Travelling Wave Tube (毫米波行波管)

HUGHES - [illegible]

High - Power TWT
Wide - Band [illegible]
寬頻帶行波管 9 - 13GHz. 功率 [illegible]

Minimum [illegible]

APPENDIX VI

ORIGINAL FILED
FEBRUARY 25, 1984
ALLYN Z. LITE
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	
	:	
V.	:	CRIMINAL NO. 84-64
DA-CHUAN ZHENG, KUANG-SHIN LIN, DAVID TSAI, KWONG ALLEN YEUNG, and JING-LI ZHANG	:	18 U.S.C. SEC. 371

The Grand Jury for the District of New Jersey, sitting at Newark, charges that:

1. At all times stated herein, the Director of the Office of Munitions Control of the United States Department of State was authorized by law to maintain the United States Munitions List, and thereby designate certain arms, ammunition and implements of war as subject to import and export

control.

2. At all times stated herein, items designated on the United States Munitions List could not lawfully be exported from the United States to a foreign country without the issuance by the United States Department of State of an export license or other written approval.

3. Between in and around January, 1984 and February 11, 1984, at Shrewsbury in the District of New Jersey and elsewhere, the defendants

DA-CHUAN ZHENG
KUANG-SHIN LIN
DAVID TSAI
KWONG ALLEN YEUNG, and
JING-LI ZHENG

did knowingly and wilfully combine, conspire, confederate and agree with each other and others unknown to the Grand Jury to commit certain offenses

against the United States; that is, to knowingly, wilfully and unlawfully export from the United States defense articles designated on the United States Munitions List without obtaining a license or other written approval from the United States Department of State, in violation of Title 22, United States Code, Sections 2778(b)(2) and (c), and Title 22, Code of Federal Regulations, Section 127.01.

4. It was a part of this conspiracy that the defendant DA-CHUAN ZHENG would travel to the United States from Hong Kong for the purpose, inter alia, of arranging for the purchase of defense articles designated on the United States Munitions List and for the further purpose of arranging for the exportation of these defense articles to the Peoples Republic of

China.

5. It was a further part of this conspiracy that the defendants DA-CHUAN ZHENG, KUANG-SHIN LIN, DAVID TSAI, KWONG ALLEN YEUNG, and JING LI ZHANG would attend meetings in the United States at which they would negotiate the terms and conditions for purchase of defense articles designated on the United States Munitions List, including English Electric Valve Co. Traveling Wave Tube Amplifier Chains and Watkins-Johnson, Inc. Traveling Wave Tube Amplifiers.

6. It was a further part of the conspiracy that the defendants DA-CHUAN ZHENG, KUANG-SHIN LIN, DAVID TSAI, KWONG ALLEN YEUNG, and JING-LI ZHANG would arrange for the purchase of defense articles on the United States Munitions List and would further

arrange for the unlawful exportation of these articles to the People's Republic of China without first obtaining an export license from the United States Department of State.

OVERT ACTS

In furtherance of the conspiracy and to effect the object thereof, the following overt acts were committed in the District of New Jersey and elsewhere.

1. On or about February 10, 1984, the defendants DA-CHUAN ZHENG, KUANG-SHIN LIN, KWONG ALLEN YEUNG, and JING-LI ZHANG met with a Special Agent of the United States Customs Service, acting in an undercover capacity, at Shrewsbury, New Jersey.

2. On or about February 10, 1984, the defendant KUANG-SHIN LIN had

a telephone conversation with an undercover United States Customs Service Special Agent.

3. On or about February 11, 1984, the defendants DA-CHUAN ZHENG, KUANG-SHIN LIN, DAVID TSAI, KWONG ALLEN YEUNG, and JING-LI ZHANG attended a meeting at Shrewsbury, New Jersey.

All in violation of Title 18, United States Code, Section 371.

/s/
FOREPERSON

/s/
W. HUNT DUMONT
UNITED STATES ATTORNEY

APPENDIX VIII

RJF:es/002K

ORIGINAL FILED
AUGUST 9, 1984
ALLYN Z. LITE
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA : Hon. H. Lee Sarokin

v. : Criminal No. 84-64

DA-CHUAN ZHENG, : AFFIDAVIT

STATE OF NEW JERSEY)
: ss:
COUNTY OF MONMOUTH)

NELSON J. WILSON, of full age, being duly sworn according to law, upon his oath deposes and says:

1. Since 1975, I have been employed by the United States Department of the Army as the Chief, Microwave/Millimeter Wave Tubes Branch in the Electronic Technology and Devices Laboratory at Fort Monmouth. In this

capacity, I have supervisory responsibility within the Department of the Army for research and development of sophisticated electronic techology having military capabilities. Among the types of electronic devices with which I have worked and become familiar over the years are various kinds of travelling wave tube amplifiers.

2. During my years of experience in the electronics field, I have come to learn that there are several different types of travelling wave tube amplifiers, and that, depending upon various aspects of their design specifications, these differing types have differing commercial uses. The majority of travelling wave tube amplifiers currently in use throughout the United States are designed specifically for utilization in the

communications field or in connection with the operation of radar systems. These travelling wave tube amplifiers are not designed to function, and cannot effectively be utilized, as military countermeasures.

3. Only certain highly sophisticated, technologically advanced and specially designed travelling wave tube amplifiers can effectively be employed to jam or otherwise counteract military radar systems.

/s/
NELSON J. WILSON

Sworn to and subscribed
before me the Eighth
day of August, 1984.

/s/
ROBERT W. NOVELLE
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES JUNE 4, 1986

APPENDIX VIII

22 USC Section 2778. Control of arms exports and imports.

(a) Presidential control of exports and imports of defense articles and services, guidance of policy, etc.; designation of United States Munitions List; issuance of export licenses; condition for export; negotiations information. (1) In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.

(2) Decisions on issuing export licenses under this section shall be made in coordination with the Director of the United States Arms Control and Disarmament Agency and shall take into account the Director's opinion as to whether the export of an article will contribute to an arms race, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control arrangements.

(3) In exercising the authorities

conferred by this section, the President may require that any defense article or defense service be sold under this Act as a condition of its eligibility for export, and may require that persons engaged in the negotiation for the export of defense articles and services keep the President fully and currently informed of the progress and future propects of such negotiations.

(b) Registration and licensing requirements for manufacturers, exporters, or importers of designated defense articles and defense services; exceptions. (1) As prescribed in regulations issued under this section, every person (other than an officer or employee of the United States Government acting in an official capacity) who engages in the business of manufacturing, exporting, or importing any defense articles or defense services designated by the President under subsection (a)(1) shall register with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations. Such regulations shall prohibit the return to the United States for sale in the United States (other than for the Armed Forces of the United States and its allies or for any State or local law enforcement agency) of any military firearms or ammunition of United States manufacture furnished to foreign governments by the United States under this Act or any other foreign assistance or sales program of the United States, whether or not enhanced in value or improved in

condition in a foreign country. This prohibition shall not extend to similar firearms that have been so substantially transformed as to become, in effect, articles of foreign manufacture.

(2) Except as otherwise specifically provided in regulations issued under subsection (a)(1), no defense articles or defense services designated by the President under subsection (a)(1) may be exported or imported without a license for such export or import, issued in accordance with this Act and regulations issued under this Act, except that no license shall be required for exports or imports made by or for an agency of the United States Government (A) for official use by a department or agency of the United States Government, or (B) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.

(c) Criminal violations; punishment. Any person who willfully violates any provision of this section or section 39 (22 USCS Section 2779), or any rule or regulation issued under either section, or who willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $100,000 or imprisoned not more than two years, or both.

(d) (Repealed)

(e) Enforcement powers of President. In carrying out functions under this section with respect to the export of defense articles and defense services, the President is authorized to exercise the same powers concerning violations and enforcement which are conferred upon departments, agencies and officials by subsections (c),(d),(e), and (f) of section 11 of the Export Administration Act of 1979 (50 USCS Appx Section 2410(c)-(f)), and by subsections (a) and (c) of section 12 of such Act (50 USCS Appx Section 2411(a) and (c)), subject to the same terms and conditions as are applicable to such powers under such Act. Nothing in this subsection shall be construed as authorizing the withholding of information from the Congress.

(f) Periodic review of items on the munitions list. The President shall periodically review the items on the United States Munitions List to determine what items, if any, no longer warrant export controls under this section. The results of such reviews shall be reported to the Speaker of the House of Representatives and to the Committee on Foreign Relations and the Committee on Banking, Housing, and Urban Affairs of the Senate. Such a report shall be submitted at least 30 days before any item is removed from the Munitions List and shall describe the nature of any controls to be imposed on that item under the Export Administration Act of 1979.

(Oct. 22, 1968, P.L. 90-629, Ch 3,

Section 38, as added June 30, 1976, P.L. 90-329, Title II, Section 212(a)(1), 90 Stat. 744; Aug. 4, 1977, P.L. 95-92, Section 20, 91 Stat. 623; Sept. 27, 1979, P.L. 96-70, Title III, Ch 3, Section 3303(a)(4), 93 Stat. 499; Sept. 29, 1979, P.L. 96-72, Section 22(a), 93 Stat. 535; Oct. 29, 1979, P.L. 96-92, Section 21, 93 Stat. 710; Dec. 16, 1980, P.L. 96-533, Title I, Section 107(a), (c), 94 Stat. 3136; Dec. 29, 1981, P.L. 97-113, Title I, Sections 106, 107, 95 Stat. 1522.)

22 USC Section 2794. Definitions

For purposes of this Act, the term---
(1) "excess defense article" has the meaning provided by section 644(g) of the Foreign Assistance Act of 1961 (22 USCS Section 2403(g)); (2) "value" means, in the case of an excess defense article, not less than the greater of---

(A) the gross cost incurred by the United States Government in repairing, rehabilitating, or modifying such article, plus the scrap value; or

(B) the market value, if ascertainable;

(3) "defense article", except as provided in paragraph (7) of this section, includes---

(A) any weapon, weapons system, munition, aircraft, vessel, boat, or other implement of war,

(B) any property, installation, commodity, material, equipment, supply,

or goods used for the purposes of making military sales,

(C) any machinery, facility, tool, material, supply, or other item necessary for the manufacture, production, processing, repair, servicing, storage, construction, transportation, operation, or use of any article listed in this paragraph, and

(D) any component or part of any article listed in this paragraph, but does not include merchant vessels or (as defined by the Atomic Energy Act f 1954) source material (except uranium depleted in the isotope 235 which is incorporated in defense articles solely to take advantage of high density or pyrophoric characteristics unrelated to radioactivity), byproduct material, special nuclear material, production facilities, utilization facilities, or atomic weapons or articles involving Restricted Data;

(4) "defense service", except as provided in paragraph (7) of this section, includes any service, test, inspection, repair, training, publication, technical or other assistance, or defense information (as defined in section 644(e) of the Foreign Assistance Act of 1961 (22 USCS Section 2403(e)), used for the purposes of making military sales, but does not include design and construction services under section 29 of this Act (22 USCS Section 2769);

(5) "training" includes formal or informal instruction of foreign

students in the United States or overseas by officers or employees of the United States, contract technicians, or contractors (including instruction at civilian institutions), or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice to foreign military units and forces;

(6) "major defense equipment" means any item of significant combat equipment on the United States Munitions List having a nonrecurring research and development cost of more than $50,000,000 or a total production cost of more than $200,000,000;

(7) "defense articles and defense services" means, with respect to commercial exports subject to the provisions of section 38 of this Act (22 USCS Section 2778), those items designated by the President pursuant to subsection (a)(1) of such section; and

(8) "design and construction services" means, with respect to sales under section 29 of this Act (22 USCS Section 2769), the design and construction of real property facilities, including necessary construction equipment and materials, engineering services, construction contract management services relating thereto, and technical advisory assistance in the operation and maintenance of real property facilities provided or performed by any department or agency of the Department of Defense or by a contractor pursuant to a contract with

such department or agency.

(Oct.22, 1968, P.L.90-629, Ch 4, Section 47, as added Dec. 17, 1973, P.L. 93-189, Section 25(12), 87 Stat. 731; June 30, 1976, P.L. 94-329, Title II, Section 215, 90 Stat. 746; Oct. 29, 1979, P.L.96-92, Section 22, 93 Stat. 710; Dec. 16, 1980, P.L. 96-533, Title I, Section 105(f), 94 Stat. 3135.)

50 USCS Appx Section 2416. Effect on other Acts

(a) In general. Nothing contained in this Act shall be construed to modify, repeal, supersede, or otherwise affect the provisions of any other laws authorizing control over exports of any commodity.

(b) Coordination of controls. The authority granted to the President under this Act shall be exercised in such manner as to achieve effective coordination with the authority exercised under section 38 of the Arms Export Control Act (22 U.S.C 2778)(22 USCS Section 2778).

(c) Civil aircraft equipment. Notwithstanding any other provision of law, any product (1) which is standard equipment, certified by the Federal Aviation Administration, in civil aircraft and is an integral part of such aircraft, and (2) which is to be exported to a country other than a controlled country, shall be subject to export controls exclusively under this Act. Any such product shall not be subject to controls under section

38(b)(2) of the Arms Export Control Act (22 USCS Sections 2778(b)(2)). For purposes of this subsection, the term "controlled country" means any country described in section 620(f) of the Foreign Assistance Act of 1961 (22 USCS Section 2370(f)).

(d) Nonproliferation controls. (1) Nothing in section 5 or 6 of this Act (50 USCS Appx. Section 2404 or 2405) shall be construed to supersede the procedures published by the President pursuant to section 309(c) of the Nuclear Non-Proliferation Act of 1978 (42 USCS Section 2139a(b)).

(2) With respect to any export license application which, under the procedures published by the President pursuant to section 309(c) of the Nuclear Non-Proliferation Act of 1978 (42 USCS Section 2139a(b)), is referred to the Subgroup on Nuclear Export Coordination or other interagency group, the provisions of section 10 of this Act (50 USCS Appx. Section 2409) shall apply with respect to such license application only to the extent that they are consistent with such published procedures, except that if the processing of any such application under such procedures is not completed within 180 days after the receipt of the application by the Secretary, the applicant shall have the rights of appeal and court action provided in section 10(j) of this Act (50 USCS Appx. Section 2409(j)).

(e) Termination of other authority. On October 1, 1979, the Mutual Defense Assistance Control Act of 1951 (22

U.S.C. 1611-1613d)(22 USCS Sections 1611-1613d), is superseded.

(Sept.29, 1979, P.L.96-72, Section 17, 93 Stat.534.)

50 USCS Appx Section 2404. National Security Controls

(a)Authority. (1)In order to carry out the policy set forth in section 3(2)(A) of this Act (50 USCS Appx. Section 2402(2)(A)), the President may, in accordance with the provisions of this section, prohibit or curtail the export of any goods or technology subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States. The authority contained in this subsection shall be exercised by the Secretary, in consultation with the Secretary of Defense, and such other departments and agencies as the Secretary considers appropriate, and shall be implemented by means of export licenses described in section 4(a) of this Act (50 USCS Appx. Section 2403(a)).

(2)(A) Whenever the Secretary makes any revision with respect to any goods or technology, or with respect to the countries or destinations, affected by export controls imposed under this section, the Secretary shall publish in the Federal Register a notice of such revision and shall specify in such notice that the revision relates to controls imposed under the authority contained in this section.

(B) Whenever the Secretary denies any

export license under this section, the Secretary shall specify in the notice to the applicant of the denial of such license that the license was denied under the authority contained in this section. The Secretary shall also include in such notice what, if any, modifications in or restrictions on the goods or technology for which the license was sought would allow such export to be compatible with controls imposed under this section, or the Secretary shall indicate in such notice which officers and employees of the Department of Commerce who are familiar with the application will be made reasonably available to the applicant for consultation with regard to such modifications or restriction, if appropriate.

(3) In issuing regulations to carry out this section, particular attention shall be given to the difficulty of devising effective safeguards to prevent a country that poses a threat to the security of the United States from diverting critical technologies to military use, the difficulty of devising effective safeguards to protect critical goods, and the need to take effective measures to prevent the reexport of critical technologies from other countries to countries that pose a threat to the security of the United States. Such regulations shall not be based upon the assumption that such effective safeguards can be devised.

(b) Policy toward individual countries. In administering export controls for national security purposes under this secton, United States policy toward

individual countries shall not be determined exclusively on the basis of a country's Communist or non-Communist status but shall take into account such factors as the country's present and potential relationship to the United States, its present and potential relationship to countries friendly or hostile to the United States, its ability and willingness to control retransfers of United States exports in accordance with United States policy, and such other factors as the President considers appropriate. The President shall review not less frequently than every three years in the case of controls maintained cooperatively with other nations, and annually in the case of all other controls, United States policy toward individual countries to determine whether such policy is appropriate in light of the factors specified in the preceding sentence.

(c) Control list. (1) The Secretary shall establish and maintain, as part of the commodity control list, a list of all goods and technology subject to export controls under this section. Such goods and technology shall be clearly identified as being subject to controls under this section.

(2) The Secretary of Defense and other appropriate departments and agencies shall identify goods and technology for inclusion on the list referred to in paragraph (1). Those items which the Secretary and te Secretary of Defense concur shall be subject to export controls under this section shall comprise such list. If the Secretary and the Secretary of Defense are unable

to concur on such items, the matter shall be referred to the President for resolution.

(3) The Secretary shall issue regulations providing for review of the list established pursuant to this subsection not less frequently than every 3 years in the case of controls maintained cooperatively with other countries, and annually in the case of all other controls, in order to carry out the policy set forth in section 3(2)(A)(50 USCS Appx. Section 2402(2)(A)) and the provisions of this section, and for the prompt issuance of such revisions of the list as may be necessary. Such regulations shall provide interested Government agencies and other affected or potentially affected parties with an opportunity, during such review, to submit written data, views, or arguments, with or without oral presentation. Such regulations shall further provide that, as part of such review, an assessment be made the availability from sources outside the United States, or any of its territories or possessions, of goods and technology comparable to those controlled under this section. The Secretary and any agency rendering advise with respect to export controls shall keep adequate records of all decisions made with respect to revision of the list of controlled goods and technology, including the factual and analytical basis for the decision, and, in the case of the Secretary, any dissenting recommendations received from any agency.

(d) Militarily critical technologies.

(1) The Secretary, in consultation with the Secretary of Defense, shall review and revise the list established pursuant to subsection (c), as prescribed in paragraph (3) of such subsection, for the purpose of insuring that export controls imposed under this section cover and (to the maximum extent consistent with the purposes of this Act) are limited to militarily critical goods and technologies and the mechanisms through which such goods and technologies may be effectively transferred.

(2) The Secretary of Defense shall bear primary responsibility for developing a list of militarily critical technologies. In developing such list, primary emphasis shall be given to--

(A) arrays of design and manufacturing know-how,

(B) keystone manufacturing, inspection, and test equipment, and

(C) goods accompanied by sophisticated operation, application, or maintenance know-how, which are not possessed by countries to which exports are controlled under this section and which, if exported, would permit a significant advance in a military system of any such country.

(3) The list referred to in paragraph (2) shall be sufficient by specific to guide te determinations of any official exercising export licensing responsibilities under this Act.

(4) The initial version of the list

referred to in paragraph (2) shall be completed and published in an appropriate form in the Federal Register not later than October 1, 1980.

(5) The list of militarily critical technologies developed primarily by the Secretary of Defense pursuant to paragraph (2) shall become a part of the commodity control list, subject to the provisions of subsection (c) of this section.

(6) The Secretary of Defense shall report annually to the Congress on actions taken to carry out this subsection.

50 USCS Appx

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Section 2405. Foreign policy controls.

(k) Control list. The Secretary shall establish and maintain, as part of the commodity control list, a list of any goods or technology subject to export controls under this section, and the countries to which such controls apply. Such goods or technology shall be clearly identified as subject to controls under this section. Such list shall consist of goods and technology identified by the Secretary of State, with the concurrence of the Secretary. If the Secretary and the Secretary of State are unable to agree on the list, the matter shall be referred to the President. Such list shall be reviewed not less frequently than every three years in the case of controls maintained cooperatively with other countries, and annually in the case of all other controls, for the purpose of making such revisions as are necessary

in order to carry out this section. During the course of such review, an assessment shall be made periodically of the availability from surces outside the United States, or any of its territories or possessions, of goods and technology comparable to those controlled for export from the United States under this section.

(Sept. 29, 1979, P.O. 96-72, sec. 6, 93 Stat. 513.)

CONSTITUTION

of the

UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions - Provisions concerning - Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SUBCHAPTER M - INTERNATIONAL TRAFFIC IN ARMS

EDITORIAL NOTE: For regulations which supersede certain provisions of this Subchapter M, see 27 CFR Part 47.

PART 121 - ARMS, AMMUNITION, AND IMPLEMENTS OF WAR

Enumeration of Articles

Sec. 121.01 The U.S. munitions list.

Definitions and Interpretations

121.02 Equipment

121.03 Significant combat equipment.

121.04 Firearms.

121.05 Cartridge and shell casings.

121.06 Military demolition blocks and blasting caps.

121.07 Apparatus and devices under Category IV(b).

121.08 Amphibious vehicles.

121.09 Chemical agents.

121.10 Propellants.

121.11 Military explosives.

121.12 Military fuel thickeners.

121.13 Vessels of war and special naval equipment.

121.14 Aircraft and related articles.

121.15 End-items, components, accessories, attachments and parts

121.16 Forgings, castings, and machined bodies.

121.17 "United States."

121.18 Person

121.19 Export.

121.20 Intransit shipments

121.21 Licenses

121.22 District Director of Customs

AUTORITY: SEC. 414, as amended, 68 Stat. 848; 22 U.S.C. 1934; secs. 101 and 105, E.O. 10973, 26 FR 10469; sec. 6, Departmental Delegation of Authority No. 104, 26 FR 10608, as amended, 27 FR 9925, 28 FR 7231; and Redelegation ot Authority No. 104-3-A, 28 FR 7231.

SOURCE: Dept. Reg. 108.605, 34 FR 12029, July 17, 1969, unless otherwise noted.

Sections 121.04-121.22 redesignated by Dept. Reg. 108.733, 42 FR 16617, Mar. 29, 1977.

ENUMERATION OF ARTICLES

Sec. 121.01 The U. S. munitions list

Pursuant to the authority cited

supra the following articles (Fn. 1) are hereby designated as arms, ammunition, and implements of war.

Category I - Firearms

(a) Nonautomatic and semiautomatic firearms, to caliber .50 inclusive, shotguns with barrels less than 18 inches in length, and all components and parts therefor (see sections 121.03 and 123.30 through 123.34).

(b) Automatic firearms and all components and parts therefor to caliber .50 inclusive (see section 121.03)

(c) Insurgency-counterinsurgency type firearms or other weapons having a special military application regardless of caliber; and all components and parts therefor.

(c) Firearms silencers.

(e) Bayonets and specifically designed components therefor.

(f) Riflescopes (except sporting type sights including optical) and specifically designed components therefor.

Category II
Artillery and Projectors

(a) Guns over caliber .50, howitzers, mortars, and recoilless rifles.

(b) Military flame throwers and

projectors.

(c) Components and parts including, but not limited to, mounts and carriages for the articles in paragraphs (a) and (b) of this category.

Category III-Ammunition

(a) Ammunition for the arms in Categories I and II of this section (see sections 123.03 and 121.04).

(b) The following components, parts, accessories, and attachments: Cartridge cases, powder bags, bullets, jackets, cores, shells (excluding shotgun), projectiles, boosters, fuzes and components therefor, primers, and other detonating devices for such ammunition (see section 121.04).

(c) Ammunition belting and linking machines.

(d) Ammunition manufacturing machines, and ammunition loading machines (except hand loading).

Category IV-Land Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines

(a) Rockets (except meteorological sounding rockets), bombs, grenades, torpedoes, depth charges, land and naval mines, and demolition blocks and blasting caps (see section 121.05).

(b) Launch vehicles, guided missiles,

and ballistic missiles, tactical and strategic.

(c) Apparatus, devices, and mateials for the handling, control, activation, detection, protection, discharge, or detonation of the articles in paragraphs (a) and (b) of this category (see section 121.06).

(d) Missile and space vehicle powerplants.

(e) Military explosive excavating devices.

(f) Ablative materials fabricated or semifabricated from advanced composites (e.g. silica, graphite, carbon, and boron filaments) for the articles in this category when clearly identifiable as arms, ammunition, and implements of war, including the tape wrapping and other techniques for their production.

(g) All specifically designed components, parts, accessories, attachments, and associated equipment for the articles in this category.

Category V-Propellants, Explosives, and Incendiary Agents

(a) Propellants for the articles in Categories III and IV of this section (see section 121.09).

(b) Military fuel thickeners (see section 121.10).

(c) Military fuel thickeners (see section 121.11).

(d) Military pyrotechnics except (i) nonirritant smoke and (ii) other pyrotechnic materials having dual military and commercial use.

Category VI-Vessels of War and Special Naval Equipment

(a) Warships, amphibious warfare vessels, landing craft, mine warfare vessels, patrol vessels, auxiliary vessels, service crafts, floating dry docks, and experimental types of naval ships (see section 121.12).

(b) Turrets and gun mounts, missile systems, arresting gear, special weapons systems, protective systems, submarine storage batteries, catapults and other components, parts, attachments, and accessories specifically designed for combatant vessels, including but not limited to, battleships, command ships, guided missile ships, cruisers, aircraft carriers, destroyers, frigates, escrots, minesweepers and submarines.

(c) Submarine and torpedo nets, and mine sweeping equipment. Components, parts, attachments and accessories specifically designed therefor.

(d) Harbor entrance magnetic, pressure, and acoustic detection devices, controls and components thereof.

(e) Naval nuclear propulsion plants, their land prototypes and special facilities for their construction, support, and maintenance, including any machinery, device, component, or

equipment specifically developed or designed for use in such plants or facilities (Fn 2) (see section 123.38).

Category VII
Tanks and Military Vehicles

(a) Military type armed or armoured vehicles, military railway trains, and vehicles fitted with, designed or modified to accommodate mountings for arms or other specialized military equipment.

(b) Military tanks, tank recovery vehicles, half-tracks and gun carriers.

(c) Self-propelled guns and howitzers.

(d) Military trucks, trailers, hoists, and skids specifically designed for carrying and handling the articles in paragraph (a) of Categories III and IV; military mobile repair shops specifically designed to service military equipment.

(e) Military recovery vehicles.

(f) Amphibious vehicles (see section 121.07).

(g) All specifically designed components, parts, accessories, attachments, and associated equipment, including military bridging and deep water fording kits for the articles in this Category.

Category VIII-Aircraft, Spacecraft, and Associated Equipment

(a) Aircraft including helicopters designed, modified, or equipped for military purposes, including but not limited to the following: Gunnery, bombing, rocket, or missile launching, electronic surveillance, reconnaissance, refueling, aerial mapping, military liaison, cargo carrying or dropping, personnel dropping, military trainers, drones, and lighter-than-air aircraft (see section 121.13).

(b) Spacecraft including manned and unmanned, active and passive satellites.

(c) Military aircraft engines, except reciprocating engines, and spacecraft engines specifically designed or modified for the aircraft and spacecraft in paragraphs (a) and (b) of this category.

(d) Airborne equipment, includig but not limited to airborne refueling equipment, specifically designed for use with the aircraft, spacecraft, and engines of the types in paragraphs (a), (b) and (c) of this category.

(e) Launching, arresting, and recovery equipment for the articles in paragraphs (a) and (b) of this category.

(f) Nonexpansive balloons in excess of 3,000 cubic feet capacity, except such types as are in normal sporting use.

(g) Power supplies and energy sources specifically designed for spacecraft.

(h) Components, parts, accessories, attachments, and associated equipment specifically designed or modified for the articles in paragraphs (a) through (g) of this category, excluding propellers used with reciprocating engines and aircraft tires.

(i) Developmental aircraft components known to have a significant military application, excluding aircraft components concerning which Federal Aviation Agency certification is scheduled.

(j) Parachutes, except such types as are in normal sporting use, and complete canopies, harnesses, and platforms, and electronic release mechanisms therefor.

(k) Ground effect machines (GEMS), including surface effect machines and other air cushion vehicles, except such machines as are in normal commercial use, and all components parts, accessories, attachments, and associated equipment specifically designed or modified for use with such machines.

(l) Inertial systems, and specifically designed components therefor, inherently capable of yielding accuracies of better than 1 to 2 nautical miles per hour circular error of probability (c.e.p.).

Category IX
Military Training Equipment

(a) Military training equipment includes but is not limited to attack

trainers, radar target trainers, radar target generators, gunnery training devices, antisubmarine warfare trainers, target equipment, armament training units, flight simulation devices, operational flight trainers, flight simulators, radar trainers, instrument flight trainers and navigation trainers.

(b) Components, parts, accessories, attachments, and associated equipment specifically designed or modified for the articles in paragraph (a) of this category.

Category X
Protective Personnel Equipment

(a) Military body armor (including armored vests), flak suits and components and parts specifically designed therefor; military helmets, including liners.

(b) Partial pressure suits, pressurized breathing equipment, military oxygen masks, anti-"G" suits, protective clothing for handling guided missile fuel, military crash helmets, liquid oxygen converters used for aircraft (enumeratd in Category VIII(a)) missiles, catapults, and cartridge actuated devices utilized in emergency escape of personnel from aircraft (enumerated in Category VIII(a)).

(c) Protective apparel and equipment specifically designed for use with the articles in paragraphs (a) through (d) in Category XIV.

(d) Components, parts, accessories, attachments, and associated equipment specifically designed for use with the articles in paragraphs (a), (b) and (c) of this category.

Category XI
Military and Space Electronics

(a) Electronic equipment not included in Category XII of the Munitions List assigned a military designation or specifically designed, modified or configured for military application, including but not limited to the following items:

(1) Underwater sound equipment including long towed arrays, electronic beam formed sonar, target classification equipment, and spectrographic displays; search, acquisition, tracking, moving target indication and imaging radar systems; active and passive countermeasures, counter-counter measures; electronic fuses; identification systems; command, control and communications systems, and regardless of designation, any experimental or developmental electronic equipment specifically designed or modified for military application, or for use with a military system, and

(2) Simple fathometers; underwater telephones; electro-mechanical beam former sonars and elementary sonobuoys; weather, navigation and air traffic control radar systems; navigation, guidance, object-locating methods and means; displays; and telemetering equipment.

(b) Space electronics: (1) Electronic equipment specifically designed or modified for spacecraft designed or modified for spacecraft ad spaceflight, other than equipment specifically designed or modified for use with communications satellites.

(2) Electronic equipment specifically designed or modified for use with communications satellites.

(c) Electronic systems or equipment designed, configured, used, or intended for use in search, reconnaissance, collection, monitoring, direction-finding, display, analysis, and production of information from the electromagnetic spectrum for intelligence or security purposes.

(d) Components, parts, accessories, attachments, and associated equipment specifically designed for use or currently used with the equipment in paragraphs (a) through (c) of this category, except such items as are in normal commercial use.

Category XII-Fire Control, Range Finder, Optical and Guidance and Control Equipment

(a) Fire control systems; gun and missile tracking and guidance systems; military infrared, image intensifier and other night sighting and night viewing equipment; military masers and military lasers; gun laying equipment; range, position and height finders and spotting instruments; aiming devices (electronic, gyroscopic, optic, and

acoustic); bomb sights, bombing computers, military television sighting and viewing units, inertial platforms, and periscopes for the articles of this section.

(b) Intertial and other weapons or space vehicle guidance and control systems; spacecraft guidance, control and stabilization systems; astro compasses; and star trackers.

(c) Components, parts, accessories, attachments, and associated equipment specifically designed or modified for the articles in paragraphs (a) and (b) of this category, except such items as are in normal commercial use.

Category XIII
Auxiliary Military Equipment

(a) Aerial cameras, space cameras, special purpose military cameras, and specialized processing equipment therefor; military photointerpretation, stereoscopic plotting and photogrammetry equipment, and specifically designed components therefor.

(b) Speech scramblers, privacy devices, cryptographic devices (encoding and decoding), and specifically designed components therefor, ancillary equipment, and especially devised protective apparatus for such device, components, and equipment.

(c) Self-contained diving and underwater breathing apparatus designed for a military purpose and specifically

designed components therefor.

(d) Armor plate.

(e) Concealment and deception equipment, including but not limited to, special paints, decoys, and simulators, components, parts and accessories specifically designed therefor.

(f) Energy conversion devices for producing electrical energy from unclear, thermal, or solar energy, or from chemical reaction, specifically designed or modified for military application.

(g) Chemiluminescent compounds and solid state devices specifically designed or modified for military application.

Category XIV-Toxicological Agents and Equipment; Radiological Equipment

(a) Chemical agents, including lung irritants, vesicants, lachrymators, and tear gases, sternutators and irritant smoke, and nerve gases and incapacitating agents (see section 121.08).

(b) Biological agents adapted for use in war to produce death or disablement in human beings or animals, or to damage crops and plants.

(c) Equipment for dissemination, detection, and identification of, and defense against the articles in paragraphs (a) and (b) of this category

(see section 123.31).

(d) Nuclear radiation detection and measuring devices, except such devices as are in normal commercial use.

(e) Components, parts, accessories, attachments, and associated equipment specifically designed or modified for the articles in paragraphs (c) and (d) of this category.

Category XV (Reserved)

Category XVI-Nuclear Weapons Design and Test Equipment (Fn 3)

(a) Any article, material, equipment, or device, which is specifically designed or specifally modified for use in the design, development, or fabrication of nuclear weapons or nuclear explosive devices.

(b) Any article, material, equipment, or device, which is specifically designed or specifically modified for use in the devising, carrying out, or evaluating of nuclear weapons tests or any other nuclear explosions except such items as are in normal commercial use for other purposes.

(c) Cold cathode tubes such as krytrons and sprytrons.

Category XVII-Classified Articles

All articles including technical data relating thereto, not enumerated herein, containing information which is

classified as requiring protection in the interests of national defense.

Category XVIII-Technical Data

Technical data relating to the articles designated in this subchapter as arms, ammunition, and implements of war (see section 125.01 for definition and section 125.11 for exemptions; see also section 123.38).

Category XIX-(Reserved)

Submersible Vessels, Oceanographic and Associated Equipment (Fn 4)

(a) Submersible vessels, manned and unmanned, designed for military purposes or having independent capability to maneuver vertically or horizontally at depths below 1,000 feet or powered by nuclear propulsion plants.

(b) Submersible vessels, manned or unmanned, designed in whole or in part from technology developed by or for the U.S. Armed Forces.

(c) Any of the articles in Categories VI, IX, XI, XIII, and elsewhere in section 121.01 of this subchapter that may be used with submersible vessels.

(d) Equipment, components, parts, accessories, and attachments designed specifically for any of the articles in paragraphs (a) and (b) of this category. (Fn 5).

Category XXI-(Reserved)

Category XXII-Miscellaneous Articles

Any article and technical data relating thereto not enumerated herein having singificant military applicability, determined by the Director, Office of Munitions control, Department of State, in consultation with appropriate agencies of the Government and having the concurrence of the Department of Defense.

(Redelegation of Authority No. 104-7-A, 35 FR 5423, 5424)

(Dept. Reg. 108.607, 34 FR 13274, Aug. 15, 1969, as amended by Dept. Reg. 108.629, 35 FR 19016, Dec. 16, 1970; Dept. Reg. 108.630, 35 FR 19994, Dec. 31, 1970; Dept. Reg. 108.646, 36 FR 20939, Nov. 2, 1971; Dept. Reg. 108.650, 36 FR 24800, Dec. 23, 1971; Dept. Reg. 108.668, 37 FR 14694, July 22, 1972; Dept. Reg. 108.733, 42 FR 16617, Mar. 29, 1977)

DEFINITIONS AND INTERPRETATIONS

Section 121.02 Equipment

The term "equipment" as used in this subchapter, unless it appears otherwise in the context, means any article (see footnote 1, section 121.01) not including technical data. The terms "equipment" and "article" include (a) experimental equipment being developed for military use, and (b) models and

mockups (with or without moving parts) if they reveal any information relating to the use, operation, maintenance, repair, overhaul, production, processing, manufacture, research, development, or design of any arms, ammunition, and implements of war on the U.S. Munitions List.

Section 121.03 Significant combat equipment.

Significant combat equipment includes the articles (not including technical data) enumerated in Categories I (a), (b) and (c) (in quantity); II (a) and (b); III(a) (excluding ammunitions for firearms in Category I): IV (a), (b), (d) and (e); V(b) (in quantity); VI(a) (limited to combatant vessels as defined in 121.12(a)) (b) (inclusive only of turrets and gun mounts, missile systems, and special weapons systems) and (e); VII (a), (b), (c), and (f); VIII (a), (b), (c), GEMS as defined in (k) and inertial systems as defined in (l); XI (a) (1), (b)(1) and (c); XII(a); XIV (a), (b), (c), and (d); XVI; XVII; and XX(a) and (b).

(Sec. 38, as amended, 90 Stat. 744, 22 U.S.C. 2778; E.O. 11958, 42 FR 4311). (Dept. Reg. 108.733, 42 FR 16617, Mar. 29, 1977).

Section 121.04 Firearms

Rifles, carbines, revolvers, and pistols, to caliber .50 inclusive, and shotguns with barrels less than 18 inches in length, are included under Category I(a). Machineguns, submachineguns, machine pistols, and

(ii) Bisdichlorethyl sulphide (Mustard gas, HD or H).

(iii) Ethyldichloroarsine (MD).

3. Lachrymators and tear gases.

(i) Brombenylcyanide (BBC).

(ii) Chloroacetophenone (CN)

(iii) Dibromodimethyl ether.

(iv) Dichlorodimethyl ether (ClCi).

(v) Ethyldibromoarsine.

(vi) Phenylcarbylamine chloride.

(vii) Tear gas solutions (CNB and CNS).

(viii) Tear gas orthochlorobenz almalononitrile (CS).

4. Sternutators and irritant smokes:

(i) Diphenylaminechloroarsine (Adamsite, DM).

(ii)Diphenylchlorarsine (BA).

(iii) Liquid pepper.

5. Nerve gases. These are toxic compounds which affect the nervous system, such as:

(i) Dimethylaminoethoxycyanophosphine oxide (GA).

(ii) Methylisopropoxyfluorophosphine

(exploders), igniters, fuze arming devices, intervalometers, and components therefor, guided missile launchers and specialized handling equipment and hardened missile launching facilities.

Section 121.08 Amphibious vehicles.

As use in Category VII (f), the term "amphibious vehicles" includes, but is not limited to, automotive vehicles or chassis embodying all-wheel drive and equipped to meet special military requirements, with adaptation features for deep water fording and sealed electrical systems.

Section 121.09 Chemical agents.

(a) (See Category XIV(a).) A chemical agent is a substance useful in war which by its ordinary and direct chemical action, produces a powerful physiological effect. The term "chemical agents" includes but is not limited to the following chemical compounds:

1. Lung irritants:

(i) Diphenylcyanoarsine (DC)

(ii)Fluorine (but not fluorene).

(iii) Trichloronitro methane (Chlorpicrin PS).

2. Vesicants:

(i) B Chlorvinyldichlorarsine (Lewisite, L).

exportation, they have been rendered useless beyond the possibility of restoration for use for the purpose originally produced by means of excessive, heating, flame treatment, mangling, crushing, cutting or popping. (Shotgun ammunition is not included in the Munitions List.)

Section 121.06 Military demolition blocks and blasting caps.

The term "military demolition blocks and blastig caps" does not include the following articles:

(a) Electric squibs.

(b) No. 6 and No. 8 blasting caps, including electric.

(c) Delay electric blasting caps (including No. 6 and No. 8 millisecond).

(d) Seismograph electric blasting caps (including SSS, Static-Master, Vibrocap SR, and SEISMO SR).

(E) Oil well perforating devices.

Section 121.07 Apparatus and devices under Category IV(b)

Category IV(b) includes inter alia the following: Fuzes and components thereof, bomb racks and shackles, bomb shackle release units, bomb ejectors, torpedo tubes, torpedo and guided missile boosters, guidance system materials (except those having a commercial application), launching racks and projectors, pistols

fully automatic rifles to caliber .50 inclusive are included under Category I(b).

(a) As used in this subchapter, the term "firearm" denotes a weapon not over .50 caliber which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. (BB and pellet guns are not included on the Munitions List.)

(b) A "rifle" is a shoulder firearm discharging bullets through a rifled barrel at least 16 inches in length, including combination and drilling guns.

(c) A "carbine" is a lightweight shoulder firearm with a short barrel, under 16 inches in length.

(d) A "pistol" is a hand-operated firearm having a chamber integral with, or permanently aligned with, the bore.

(e) A "revolver" is a hand-operated firearm with a revolving cylinder containing chambers for individual cartridges.

(f) A "machinegun", "machine pistol" or "submachinegun" is a firearm originally designed to fire, or capable of being fired fully automatically by a single pull of the trigger.

Section 121.05 Cartridge and shell casings.

Cartridge and shell casings are included under Category III of the U.S. Munitions List unless, prior to their

oxide (GB).

(iii) Methylpinacolyloxyfluoriphosphine oxide (GD).

6. Antiplant chemicals:

(i) Butyl 2-chloro-4-fluorophenoxyacetate (LNF).

(Dept. Reg. 108.605, 34 FR 12029, July 17, 1969, as amended by Dept. Reg. 108.630, 35 FR 19994, Dec. 31, 1970; Dept. Reg. 108.646, 36 FR 20940, Nov. 2, 1971. Redesignated by Dept. Reg. 108.733, 42 FR 16617, Mar. 29, 1977).

Section 121.10 Propellants.

The term "propellants" includes but is not limited to the following:

(a) Propellant powders, including smokeless shotgun power (see section 123.37).

(b) Hydrazine (including monomethyl hydrazine and symmetrical dimethyl hydrazine but excluding hydrazine hydrate).

(c) Unsymmetrical dimethyl hydrazine.

(d) Hydrogen peroxide over 85 percent concentration.

(e) Nitroguanadine or picrite.

(f) Nitrocellulose with nitrogen content of over 12.20 percent.

(g) Nitrogen tetroxide.

(h) Other solid propellant compositions, including but not limited to the following:

(1) Single base (nitrocellulose).

(2) Double base (nitrocellulose, nitroglycerin, nitroguanidine).

(3) Triple base (nitrocellulose, nitroglycerin, nitroguanidine).

(4) Composite of nitroglycerin, ammonium perchlorate, potassium perchlorate, nitronium perchlorate, guanidine (guanidinium) perchlorate, nitrogen tetroxide, ammonium nitrate or nitrocellulose with plastics, metal fuels, or rubbers added; and compounds composed only of fluorine and one or more of the following: Other halogens, oxygen, or nitrogen.

(5) Special purpose chemical base high energy solid military fuels.

(i) Other liquid propellant compositions, including but not limited to the following:

(1) Monopropellants (hydrazine, hydrazine nitrate, and water).

(2) Bipropellants (Hydrazine, fuming nitric acid HNO3).

(3) Perchloryl fluoride.

(4) Special purpose chemical base high energy liquid military fuels and oxidizers.

Section 121.11 Military explosives.

The term "military explosives" includes, but is not limited to, the following:

(a) Ammonium picrate.

(b) Black powder made with potassium nitrate or sodium nitrate.

(c) Cyclotetramethylene - tetranitramine (HMX).

(d) Cyclotrimethylene - trinitramine (RDX, Cyclonite, Hexogen or T4).

(e) Dinitronaphthalene.

(f) Ethylenedinitramine.

(g) Hexanitrodiphenylamine.

(h) Nitroglycerin.

(i) Nitrostarch.

(j) Pentaerythritol tetranitrate (penthrite, pentrite or PETN).

(k) Tetranitronaphthalene.

(l) Trinitroanisol.

(m) Trinitronaphthalene.

(n) Trinitrophenol (picric acid).

(o) Trinitrophenylmethylnitramine (Tetryl).

(p) Trinitrotoluene (TNT).

(q) Trinitroxylene.

(r) Ammonium perchlorate nitrocellulose (military grade).

(s) Any combinations of the above.

Section 121.12 Military fuel thickeners.

The term "military fuel thickeners" includes: compounds (e.g. octal), or mixtures of such compounds (e.g. napalm) specifically formulated for the purpose of producing materials which, when added to petroleum products, provide a gel-type incendiary material for use in bombs, projectiles, flame throwers or other implements of war.

Section 121.13 Vessels of war and special naval equipment.

(See Category VI). The term "vessels of war" includes, but is not limited to, the following:

(a) Combatant:

(1) Warships (including nuclear powered versions):

Aircraft carriers (CVA, CVE, CVHE, CVL, CVS).

Battleships (BB, BBG).

Command ships (CBC< CLC).

Cruisers (CA, CAG, CB, CG, CL, CLAA, CLG).

Destroyers (DD, DDC, DDE, DDG, DDR, DL, DLG).

Submarines (SS, SSB, SSG, SSK, SSR).

(2) Amphibious warfare vessels:

Amphibious assault ship (LPH).

Amphibious force flagship (AGC).

Assault helicopter aircraft carrier (CVHA).

Attack cargo ship (AKA).

Control escort vessel (DEC).

Cargo submarine (AK(SS)).

Inshore fire support ship ((FS).

Landing ships (LSD, LSMR, LST, LPD).

Transport submarine (AP(SS)).

Transports (APA, APD).

(3) Landing craft (LCM, LCU, LCVP, ATC, CCB).

(4) Landing vehicle, tracked (LVT).

(5) Mine warfare vessels:

Mine hunter, coastal (MHC).

Mine countermeasures support ship (MCS).

Minelayers (DM, MMA, MMC, MMF).

Minesweepers (DMS, MSC, MSC(O), MSF, MSO, MSI, MSB, MSA, YMS, MSL, Ub/MS).

(6) Patrol vessels:

Escort vessels (DE, DER, PCS, PCER, PF, DEG)

Gunboats (PCM, PR)

Submarine chasers (PC, PCS, SC).

Yacht (PY).

(b) Auxiliary vessels and service craft:

(1) Advanced aviation base ship (AVB).

(2) Auxiliary submarine (AC(SS)).

(3) Cable repairing or laying ship (ARC).

(4) Degaussing vessel (ABG).

(5) Distilling ship (AW).

(6) Drone aircraft catapult control craft (YV).

(7) Floating dry docks, cranes, and associated workships and lighters (AFDB, AFDL, AFDM, ARD, YFD, YFMD, YR, YRDH, YRDM, YHL, YSD).

(8) Guided missile ship (AVM).

(9) Harbor utility craft (YFU).

(10) Icebreaker (AGB).

(11) Logistic support ships (AE, AF, AK, AKS, AO, ACE, AGO, AOR, AO(SS),

AVS).

(12) Miscellaneous cargo ships (AKD, AKL, AKV, AVT).

(14) Naval barges and lighters (YC, YCF, YCK, YCV, YF, YFB, YFN, YFNS, YFNX, YFP, YFR, YFRN, YRFT, YFT, YG, YGN, YO, YOG, YOGN, YON, YOS, YSR, YTT, YW, YWN).

(15) Net laying and tending ships (AKN, AN, YNG).

(16) Oceanographic research ship (AGOR).

(17) Patrol craft (PT, YP).

(18) Repair, salvage and rescue vessels (AR, ARB, ARG, ARL, ARS, ARSD, ARV, ARVA, ARVE, ASR).

(19) Survey ships (GS, AGSC).

(20) Target and training submarine (SST).

(21) Tenders, (AD, AGP, ARST, AS, AV, AVP, YDT).

(22) Transports and barracks vessels (AP, APB, APC, APL, YHB, YRB, YRBM).

(23) Tugs (ATA, ATF, ATR, YTB, YTL, YTM).

(24) Ocean radar picket ship (AGR).

(25) Submersible craft (X). (See Category XX).

(26) Utility aircraft carrier (CVU).

(c) Coast Guard patrol and service vessels and craft:

(1) Submarine repair and berthing barge (YRB).

(2) Labor transportation barracks ship (APL).

(3) Coast Guard cutter (CGC).

(4) Gunboat (WPG)

(5) Patrol craft (WPC, WSC).

(6) Seaplane tender (WAVB).

(7) Icebreaker (WAGB).

(8) Cargo ship (WAK).

(9) Buoy tenders and boats (WAGE, WD).

(10) Cable layer (WARC).

(11) Lightship (WAL).

(12) Coast Guard tugs (WAT, WXT).

(13) Radio ship (WAGR).

(14) Special vessel (WIX)

(15) Auxiliary vessels (WAG, WAGE).

(16) Other Coast Guard patrol or rescue craft (i) of over 300 horepower when equipped with a gas turbine enginer or engines, and (ii) of over 600 horsepower when equipped with an engine or engines of the internal combustion, reciprocating type.

(d) Air Force craft: Air Force rescue boat.

(e) Army vessels and craft:

(1) Transporation Corps tug: 100 ft. (LT), 65 ft. (ST), T-boat, Q-boat, J-boat, E-boat.

(2) Barges (BG, BC, BR, BSP, BSPI, BKI, BCF, BBL, BARC, BK).

(3) Cranes, floating (BD)

(4) Drydock, floating (FDL).

(5) Repair ship, floating (FMS)

(6) Trainer, amphibious 20 ton wheeled two boat, inland waterway (LTI, STI).

(Dept. Reg. 108.605, 34 FR 12029, July 17, 1969; 34 FR 12437, July 30, 1969. Redesignated by Dept. Reg. 108.733. 42 FR 16617, Mar. 29, 1977)

Section 121.14 Aircraft and related articles.

(a) The term "aircraft" used in Category VIII of the U.S. Munitions List means aircraft designed, modified, or equipped for military purpose as specified in Category VIII, including so called "demilitarized" aircraft. The export of such aircraft is subject to the licensing requirements of the Department of State.

(b) Regardless of demilitarization, all aircraft bearing an original military designtion are included in

Category VIII of the U. S. Munitions List, except the following aircraft which have not been specifically equipped, reequipped, or modified for military operations:

(1) Cargo aircraft being "C" designations C-45 throgh C-118 inclusive, and C-121.

(2) Trainer aircraft bearing "T" designations and using reciprocating engines only.

(3) Utility aircraft bearing "U" designations and using reciprocating engines only.

(4) All liaison aircraft bearing an "L" designation.

(5) All observation aircraft bearing "O" designations and using reciprocating engines only.

(Dept. Reg. 108.605, 35 FR 12029, July 17, 1969 as amended by Dept. Reg. 108.630, 35 FR 19994, Dec. 31, 1970. Redesignated by Dept. Reg. 108.733, 42 FR 16617, Mar. 29, 1977).

Section 121.15 End-items, components, accessories, attachments, and parts.

(a) End-items are defined as assembled whole systems or equipment, ready for its intended use, (1) for which only ammunition, fuel or other energy sources are required to place them in an operating state, and (2) consisting of compondents and parts, with or without accessories or attachments. (Examples: Rifles, tanks,

aircraft, transceivers, ships, etc.)

(b) Components are items which are useful only when used in conjunction with an end-item. They are defined as either major or minor: (1) Major components include any assembled elements which form a portion of an end-item without which the end-item is inoperable (examples: Airframes, tail sections, engines, transmissions, tank treads, hulls, etc.); and (2) minor components include any assembled elements of a major component.

(c) Accessories and attachments are defined as elements of any components, systems, or products not necessary for the operation of an end-item, but which enhance the usefulness or effectiveness of the end-item. (Examples: Riflescopes, special paints, etc.)

(d) Parts are defined as any single unassembled elements of major and minor compondents, accessories and attachments which are not normally subject to disassembly without destruction or impairment of design use. (Examples: Rivets, wire, bolts, etc.)

(Redelegation of Authority No. 104-7-A, 35 FR 5423, 5424).

(Dept. Reg. 108.668, 37 FR 14694, July 22, 1972. Redesignated by Dept. Reg. 108.733, 42 FR 16617, Mar. 29, 1977).

Section 121.16 Forgings, castings, and machined bodies.

Items in a partially completed state,

such as forgings, castings, extrusions, and machined bodies of any of the articles enumerated on the U.S. Munitions List which have reached a stage in Manufacture where they are clearly identifiable as arms, ammunition, and implements of war are considered to be such articles for the purposes of section 414 of the Mutual Security Act, as amended.

Section 121.17 "United States"

For the purposes of this subchapter the term "United States" when used in the geographical sense, unless otherwise expressly defined, includes the several States, the insular possessions of the United States, the Canal Zone, the District of Columbia, and any territory over which the United States exercises all and any powers of administration, legislation and jurisdiction.

Section 121.18 Person.

For the purposes of this subchapter the term "Person" includes a partnership, company, association, corporation, firm, society or joint stock company, as well as a natural person.

Section 121.19 Export.

For the purposes of this subchapter the term "export" means the sending or taking out of the United States in any manner any article, equipment, or technical data on the U.S. Munitions List except as may be otherwise expressly provided in a particular

context.

Section 121.20 Intransit shipments.

For the purposes of this subchapter equipment on the U.S. Munitions List temporarily entering the United States in transit to another country, including return to the country of export, shall constitute a temporary import for which a Department of State Intransit License (DSP-61) shall be required.

Section 121.21 Licenses.

(a) For the purposes of this subchapter the term "license" denotes a document bearing the word "license" which when dated, sealed, numbered, and signed by the Secretary of State or his authorized designees permits the export, temporary export, or intransit shipment of specific articles on the U.S. Munitions List (See section 123.05).

(b) Licenses shall be issued valid for 12 months unless a different period is expressly stated thereon. Licenses are not transferable.

(c) No photographic or other copy may be made of an original license unless authorized by the Department of State.

(Dept. Reg. 108.605, 34 FR 12029, July 17, 1969, as amended by Dept. Reg. 108.629, 35 FR 19016, Dec. 16, 1970; Dept. Reg. 108.646, 36 FR 20940, Nov. 2, 1971. Redesignated by Dept. Reg. 108.733, 42 FR 16617, Mar. 29, 1977).

Section 121.22 District Director of Customs

When used in this subchapter the term "district director of customs" includes the district directors of customs at customs headquarters ports (other than the port of New York, N. Y.); the regional commissioner of customs, the deputy and assistant regional commissioners of customs for customs region II at the port of New York, N. Y.; and port directors at customs ports not designated as headquarters ports.

Footnotes

Fn. 1. The term "article" shall mean any of the arms, ammunition, and implements of war and technical data relating thereto enumerated in the U.S. Munitions List (see section 123.38).

Fn 2. Applications for licensing the export of any such machinery, device, component, or equipment, or technical data relating thereto, will not be granted if the proposed export does not come within the scope of an existing Agreement for Cooperation for Mutual Defense Purposes concluded pursuant to the Atomic Energy Act of 1954, as amended, with the government of the country to which the item will be exported; unless the license application involves an item (a) which is identical to that in use in an unclassified civilian nuclear powerplant, and its furnishing does not disclose its relationship to naval

nuclear propulsion, and (b) which is not for use in a naval propulsion plant.

Fn 3. See section 123.38. See also Department of Commerce Export Regulations, 15 CFR 373.7.

Fn 4. Any submersible vessels, oceanographic or associated equipment assigned a military designation shall constitute an article on the U.S. Munitions List, whether expressly enumerated therein.

Fn 5. Items, including technical data relating thereto, for submarine nuclear propulsion plants which upon review are determined to have significant naval nuclear propulsion applicability will be considered as naval nuclear propulsion items for the purposes of these regulations and processed in accordance with Category VI(e) and the footnote thereto.

PART 122 - REGISTRATION

Sec. 122.01 Registration requirements.

122.02 Application for registration.

122.03 Refund of fee.

122.04 Notification of changes in information furnished by registrants.

122.05 Maintenance of records by registrants.

PROCEDURES

122.10 Submission of application.

AUTHORITY: Sec. 414, as amended, 68 Stat. 848, 22 U.S.C. 1934; secs. 101 and 105, E.O. 10973, 26 FR 10469, sec. 6, Departmental Delegation of Authority No. 104, 26 FR 10608, as amended, 27 FR 9925, 28 FR 7231; Redelegation of Authority No. 104-3-A, 28 FR 7231.

Section 122.01 REGISTRATION REQUIREMEN

(a) Persons (as defined in Section 121.17 of this subchapter) engaged in the business, in the United States, of manufacturing or exporting articles enumerated in the U.S.Munitions List, shall be required to register with the Secretary of State. Manufacturers, whether they engage in export, shall also be required to register.

(b) Persons engaged in the business, in the United States, of exporting articles enumerated in the U.S. Munitions List, and importing such articles under the provisions of Title 26, Code of Federal Regulations, are required to register for a fee with the Secretary of State as exporters, and to register for a fee with the Secretary of the Treasury as importers.

(c) The fabrication of arms, ammunition, and implements of war for experimental or scientific purposes, including research and development, is not considered as manufacture for the purposes of the regulations in this

part.

(d) Registration is not required of persons (1) whose pertinent business activities are confined to the production or exportation of unclassified technical data relating to arms, ammunition.

Section 126.02 Temporary Suspension or Modification of Regulations of the Subchapter

The Director, Office of Munitions Control, Department of State, is authorized to order the temporary suspension or modification of any or all of the regulations of this subchapter in the interest of furthering the objectives of world peace and the securtiy and foreign policy of the United States.

Section 126.03 Waiver or Exception in Hardship Cases

In bona fide cases showing exceptional and undue hardship, the Director, Office of Munitions Control, Department of State, is authorized to make an exception to the regulations of this subchapter after full review.

Section 126.04 Shipments by U.S. Government Agencies

(a)The export of articles on the U.S. Munitions List by any department or agency of the U.S. Government is not subject to the provisions of section 414 of the Mutual Security Act of 1954, as amended. A license to export such

articles, therefore, is not required when (1) all aspects of a transaction (export, carriage, and delivery abroad) are effected by a U.S. Government agency, or (2) actual transfer of possession of U.S. Government-owned articles is effected in the United States by an agency of the U.S. Government to a foreign government or its carrier and no private person or forwarding agent is involved in the export transaction.

(b) A license shall be required when a private person or forwarding agent is involved in any aspect of an export transaction unless the regulations in this subchapter contain a specific exemption from the need for a license under the particular circumstances of the transaction, or the consignor, consignee, and intermediate consignee (if any) are agencies of the U.S. Government and the export is covered by a U.S. Government Bill of Lading.

(c) This section does not authorize any Government department or agency to export any items listed in Section 121.01 of this subchapter which are subject to restrictions by virtue of other statutory provisions.

(Dept. Reg. 108.646. 36 FR 20942. Nov. 2, 1972)

Section 126.05 Relation to other Provisions of Law

The provisions in this subchapter are in addition to, and are not in lieu of, any other provision of law or regulations respecting commerce in

arms, ammunition, and implements of war, and technical data relating thereto.

PART 127 - VIOLATIONS, PENALTIES AND ADMINISTRATIVE REMEDIES

Sec. 127.01 Violations in General

127.02 Misrepresentation and omission of facts.

127.03 Criminal penalties.

127.04 Penalties for violations relating to Southern Rhodesia.

127.05 Authority of district directors of customs.

127.06 Seizure and forfeiture in attempts at illegal exports.

127.07 Debarment.

127.08 Interim suspension.

127.09 Applicability of orders.

127.10 Civil penalty.

AUTHORITY: Sec. 414, as amended, 68 Stat. 848;22 U.S.C.1934; 18 U.S.C.1001: 22 U.S.C. 401; secs. 101 and 105, E.O. 10973, 26 FR 10469; sec 6, Departmental Delegation of Authority No. 104, 26 FR 1068, as amended, 27 FR 9925, 28 FR 7231; and Redelegation of Authority No. 104-3-A, 28 FR 7231. The provisions of Part 127 regarding exports to Southern Rhodesia, issued

under E.O. 11322, 32 FR 119; 59 Stat. 620, 22 U.S.C. 287c.

SOURCE: Dept. Reg. 108.605, 34 FR 12040. July 17, 1969, unless otherwise noted.

Section 127.01 Violations in General.

(a)It is unlawful to export or attempt to export from the United States any article or technical data for which a license or approval is required by this subchapter without first obtaining the required license or written approval from the Department of State.

(b) No person, with knowledge that another person is then subject to an order or debarment, or interim suspension, directly or indirectly, in any manner or capacity, without prior disclosure of the facts to, and written authorization of the Office of Munitions Control:

(1)May apply for, obtain, or use any export control document as defined in Section 127.02(b) by, to, or for such debarred or suspended person; or

(2) May order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate in, any transaction which may involve any article or technical data for which a license or approval is required by this subchapter, exported or to be exported from the United States, whereby a debarred or suspended person may obtain

any benefit therefrom or have any direct or indirect interest therein.

(c) No person may cause, or aid, abet, counsel, demand, induce, procure, or permit, the commission of any act prohibited by, or the omission of any act required by 22 U.S.C. 2778, 22 U.S.C. 2779, or any regulation, license, approval, or order issued thereunder.

(Dept. Reg. 108.744, 42 FR 42852, Aug. 25, 1977)

Section 127.02 Misrepresentation and Omission of Facts.

(a) It is unlawful to use any export or intransit control document containing a false statement or misrepresenting or omitting a material fact for the purpose of exporting any article or technical data for which license approval is required by this subchapter. Any false statement, misrepresentation or omission of material fact in an export or intransit control document will be considered, as made in a matter within the jurisdiction of a department or agency of the United States for the purposes of 18 U.S.C. 1001, 22 U.S.C. 2778 and 22 U.S.C. 2779.

(b) For the purpose of this section, the term export or intransit control document includes the following:

(1) Applications for export or intransit license and supporting documents.

(2) Shippers export declarations.

(3) Invoices.

(4) Declarations of destination.

(5) Delivery verifications.

(6) Applications for temporary export license.

(7) Applications for registration.

(8)Purchase orders.

(9)Foreign import certificates.

(10) Bills-of-lading

(11) Air way bills.

(12) Consignee-purchaser transaction statements.

(13) Nth country control statements.

(14) Any other document used in the regulation or control of articles or technical data for which license or approval is required by this subchapter.

(Dept Reg 108.605, 34 FR 12040, July 17, 1969, as amended by Dept Reg 108.744, 42 FR 42852, Aug 24, 1977)

Section 127.03 Criminal Penalties

Any person who willfully--

(a)Violates any provision of section 38 or section 39 of the Arms Export

Control Act (22 U.S.C. 2778, 2779), or any rule or regulation issued under either section; or

(b) In a registration, license application or report required by section 38 or section 39 of the Arms Export Control Act (22 U.S.C. 2778, 2779) or by any rule or regulation issued under either section, makes any untrue statement of a material fact or omits a material fact required to be stated therein or necessary to make the statements therein not misleading--

shall, upon conviction, be subject to fine or imprisonment, or both, as prescribed by 22 U.S.C. 2778(c).

(Dept. Reg. 108.744, 42 FR 42852, Aug. 25, 1977).

Section 127.04 Penalties for Violation Relating to Southern Rhodesia

Any person subject to the jurisdiction of the United States who, with regard to exports from the United States to Southern Rhodesia, willfully violates any provision of section 1(d), of Executive Order 11322 or any rule or regulation contained in this part, or who willfully in a registration or license application makes any untrue statement of a material fact, or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, shall, upon conviction, be fined not more than $10,000, or imprisoned not more than 10 years, or both.

Section 127.05 Authority of District

Directors of Customs

(a) District directors of customs are authorized to take appropriate action to insure observance of this subchapter as to the exportation, or the attempted exportation of arms, ammunition, and implements of war, and technical data relating thereto, whether authorized by licenses or written approval issued under this subchapter, including but not limited to inspection of loading or unloading of carriers.

(b) Upon the presentation of a license or written approval to a customs officer, authorizing the exportation of arms, ammunition, and implements of war, and technical data relating thereto, the customs officer may require, in addition to such documents as may be required by customs regulations, the production of other relevant documents and information relating to the proposed exportation, including, but not limited to, invoices, orders, packing lists, shipping documents, correspondence, and instructions.

Section 127.06 Seizure and Forfeiture in Attempts at Illegal Exports

(a) Any attempt to export or ship from or take out of the United States any articles on the U.S. Munitions List in violation of the provisions of this subchapter shall constitute an offense punishable under section 401 of Title 22 of the United States Code. Whenever it is known or there shall be probable cause to believe that any articles on the U.S. Munitions List

are intended to be or are being or have been exported or removed from the United States in violation of law, such articles and any vessel, vehicle or aircraft involved in such attempt shall be subject to seizure, forfeiture and disposition as provided in section 401 of Title 22 of the United States Code.

(b) Similarly, any attempt to violate any of the conditions under which a Temporary Export or Intransit License was issued pursuant to this subchapter shall also constitute an offense punishable under section 401 of Title 22 of the United States Code, and such articles, together with any vessel, vehicle or aircraft involved in such attempt shall be subject to seizure, forfeiture, and disposition as provided in section 401 of Title 22 of the United States Code.

Section 127.07 Debarment

(a) Debarment orders. The Director, Bureau of Politico-Military Affairs, is authorized to debar (prohibit) any person from participating directly or indirectly in the export of articles or technical data for which license or approval is required by this subchapter for any of the causes listed below when to do so is important for the maintenance of the regulatory scheme. The following are cause for debarment.

(1) Conviction of a criminal offense as defined in Section 127.03.

(2) The violation of 22 U.S.C. 2778 or of any rule or regulation issued

thereunder when such a violation is of such character as to provide a reasonable basis to believe and determine that the violator cannot be relied upon to comply with the statute, rules, or regulations in the future, and when such a violation is established in accordance with Sections 128.02 through 128.16 of this chapter.

(3) The violation of any provision of 22 U.S.C. 2778, or of any rule or regulation issued thereunder when, because it is a second or subsequent violation, it impels the belief that the violator cannot be relied upon to comply with the statute, rules or regulations in the future and when the violations are established in accordance with Sections 128.02 through 128.16 of this chapter.

(4) A decision by the Office of Export Administration, Bureau of East-West Trade of the Department of Commerce, to deny, suspend, or revoke export privileges to the person under 15 CFR 388.1 and the Export Administration Act of 1969 or to exclude the person from practice before the Bureau of East-West Trade under 15 CFR 390.2 and the Export Administration Act of 1969, where the Hearing Commissioner makes a further finding that the facts reasonably impel a decision that they form a reasonable basis for concluding that the person cannot be relied upon to comply in the future with 22 U.S.C. 2778, or with the rules or regulations issued thereunder.

(b) Motions to vacate or modify. A

person who has been debarred for more that 12 months may petition the Hearing Commissioner to vacate or modify the order of debarment. The petition must be filed with the Hearing Commissioner, and a copy simultaneously filed with the Office of Munitions Control, Department of State. In his discretion, the Hearing Commissioner may require the submission of evidence and arguments, oral or written or both. The Hearing Commissioner, after considering the motion and any evidence and arguments with respect thereto, shall at the earliest practicable date submit his report and recommendations to the Director, Bureau of Politico-Military Affairs, Department of State. The Director may issue an appropriate order disposing of the motion and the moving party will be informed.

(Dept. Reg. 108.744, 42 FR 42852, Aug. 25, 1977)

Section 127.08 Interim Suspension

(a) Interim suspension orders. The Director of the Office of Munitions Control is authorized to order the interim suspension of any person, prohibiting that person from participating directly or indirectly in the export of any article or technical data for which a license or approval is required by this subchapter, when he believes grounds for debarment as defined in Section 127.07 exist, and where and to the extent he finds interim suspension is reasonably necessary to protect world peace or the

national security or foreign policy of the United States, pending final disposition of debarment proceedings. The suspended person shall be sent a charging letter as provided in Section 128.03 of this chapter. A copy of the interim suspension order will be served upon him in the same manner as provided in Section 128.07 of this chapter for service upon him of a charging letter. The interim suspension order may be made effective immediately, without prior notice or hearing. The order will briefly recite the relevant facts, state the grounds for issuance of the order, and describe the nature and duration of the interim suspension. No person may be suspended for a period exceeding 60 days unless preceedings under Sections 128.02 through 128.16 of this chapter or criminal proceedings are initiated before the expiration of that period.

(b) Motions to vacate or modify. A motion or petition to vacate or modify an interim suspension order may be filed at any time with the Hearing Commissioner, and a copy shall be filed with the Office of Munitions Control, Department of State. An oral hearing, if requested, will be held before the Hearing Commissioner at the earliest practicable date. The Hearing Commissioner, after considering the assembled record, will submit his report and recommendations to the Director, Bureau of Politico-Military Affairs, Department of State. The Director will issue an appropriate order disposing of the motion or petition and will promptly inform the respondent accordingly.

(c) Deferment of action on license applications otherwise prohibited. Except for the particular application or license which is itself the basis of any investigation or proceeding, no license application filed by any person may be returned without action, held without action, or rejected, solely because such person is under investigation, or because proceedings against him are pending, other than in accordance with the terms of an interim suspension order issued under Section 127.08(a).

(Dept. Reg. 108.744, 42 FR 42852, Aug. 25, 1977)

Section 127.09 Applicability of orders

For the purpose of preventing evasion, orders of the Director, Bureau of Politico-Military Affairs, debarring a person under Section 127.07, and orders of the Director, Office of Munitions Control, suspending a person under Section 127.08, may be made applicable to any other person who may then or thereafter (during the term of the order) be related by affiliation, ownership, control, position of responsibility, or other commercial connection. Appropriate notice and opportunity to respond to charges will be given.

(Dept.Reg.108.744, 42 FR 42852, Aug. 25, 1977)

Section 127.10 Civil Penalty

(a)The Director, Bureau of Politico-Military Affairs, is authorized to impose a civil penalty in an amount not to exceed that authorized by 50 U.S.C. 2405 (c) for each violation of 22 U.S.C. 2778, or any regulation, order, license or approval issued thereunder. This civil penalty may be either in addition to, or in lieu of, any other liability or penalty which may be imposed.

(b) The Office of Munitions Control may make the payment of a civil penalty under this section a prior condition of the issuance, restoration, or continuing validity of any export license.

(Dept. Reg. 108.744, 42 FR 42852, Aug. 25, 1977)

Supreme Court, U.S.
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No. 85-864

In the Supreme Court of the United States

OCTOBER TERM, 1985

DA-CHUAN ZHENG AND KUANG-SHIN LIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in vacating an order dismissing an indictment.[1]

On February 23, 1984, petitioners were charged in an indictment returned in the United States District Court for the District of New Jersey with conspiracy to violate the Arms Export Control Act, 22 U.S.C. 2778, by arranging for the export of traveling wave tube amplifiers without a license. Traveling wave tube amplifiers constitute "active and passive countermeasures" or "counter-countermeasures," which are defense articles designated on the United States Munitions List, 22 C.F.R. 121.1 Category XI(a)(1);

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[1]The petition was filed on October 28, 1985, more than 60 days after the court of appeals denied rehearing on August 27, 1985 (Pet. App. 10a-11a). It therefore appears to be out of time under Rule 20.1 of the Rules of this Court.

unauthorized export of defense articles is prohibited by the Act. On July 26, 1984, the district court dismissed the indictment on the ground that the Munitions List does not comply with the Act, which authorizes the President to designate "items" as defense articles. Pet. App. 12a-20a; 590 F. Supp. 274. In the district court's view, " '[c]ountermeasures' is simply too broad a description to be considered an 'item.' " Pet. App. 15a.

The court of appeals vacated and remanded for further proceedings. Pet. App. 1a-7a; 768 F.2d 518. The court of appeals reasoned that " 'items' is a relative term whose contours are constructed by context" and that "the President should be given wide latitude in interpreting the delegation of authority" to designate items on the Munitions List. Pet. App. 6a. The court concluded that, given the legislative history of the Act and the context of Category XI of the List, which includes "highly specialized electronic equipment used for particular military purposes," the terms " 'countermeasures' and 'counter-countermeasures' are appropriate designations of 'items' for inclusion on the Munitions List." *Id.* at 7a.

Petitioners contend (Pet. 15-47) that the indictment is defective because "countermeasures" is not an "item" within the meaning of the Act, the Act violates the nondelegation doctrine, and the List is unconstitutionally vague. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court.[2] The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners are acquitted

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[2]It is now over 21 months since the return of the indictment and almost 17 months since the district court's order. Interlocutory review at this time would cause additional delay in the trial of the charges against petitioners.

following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

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[3]Because this case is interlocutory, we are not responding to the merits of the questions presented by the petition. We will file a response on the merits if the Court requests.